DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-417
Title: Clifton Sandifer, et al., Petitioners
v.
United States Steel Corporation
Docketed: October 4, 2012
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (10-1821, 10-1866)
Decision Date: May 8, 2012
Rehearing Denied: June 11, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Sep 10 2012	Petition for a writ of certiorari filed. (Response due November 5, 2012)
Oct 23 2012	Waiver of right of respondent United States Steel Corporation to respond filed.
Oct 29 2012	DISTRIBUTED for Conference of November 20, 2012.
Nov 13 2012	Response Requested . (Due December 13, 2012)
Nov 19 2012	Order extending time to file response to petition to and including January 14, 2013.
Jan 14 2013	Brief of respondent United States Steel Corporation in opposition filed.
Jan 30 2013	DISTRIBUTED for Conference of February 15, 2013.
Jan 30 2013	Reply of petitioners Clifton Sandifer, et al. filed. (Distributed)
Feb 19 2013	Petition GRANTED limited to Question 1 presented by the petition.
Mar 5 2013	Record from U.S.C.A. for 7th Circuit is electronic with the exception of 1 box of exhibits.
Mar 5 2013	Record from U.S. District Court for the Northern District of Nevada is electronic with the exception of 1 box of exhibits.
Mar 11 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Mar 25 2013	The time to file the joint appendix and petitioners' brief on the merits is extended to and including May 13, 2013.
Mar 25 2013	The time to file respondent's brief on the merits is extended to and including July 12, 2013.
May 13 2013	Joint appendix filed. (Statement of costs filed.)
May 13 2013	Brief of petitioner Clifton Sandifer, et al. filed.
May 20 2013	Brief amici curiae of American Federation of Labor and Congress of Industrial Organizations, et al. filed.

Jul 10 2013	The time to file respondent's brief on the merits is further extended to and including July 19, 2013.
Jul 19 2013	Brief of respondent United States Steel Corporation filed.
Jul 26 2013	Brief amicus curiae of the United States filed.
Jul 26 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 26 2013	Brief of amicus curiae Grocery Manufacturers Association filed.
Jul 26 2013	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Jul 26 2013	Brief amici curiae of American Meat Institute, et al. filed.
Aug 19 2013	CIRCULATED.
Aug 19 2013	Reply of petitioners Clifton Sandifer, et al. filed. (Distributed)
Aug 20 2013	SET FOR ARGUMENT on Monday, November 4, 2013.
Oct 7 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 4 2013	Argued. For petitioners: Eric Schnapper, Seattle, Wash. For respondent: Lawrence C. DiNardo, Chicago, Ill.; and Anthony A. Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

No. 12-417

FILED

SEP 10 2012

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In The
Supreme Court of the United States

CLIFTON SANDIFER, *et al.*,

Petitioners,

v.

UNITED STATES STEEL CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Fair Labor Standards Act, the period of time during which a covered employee must be paid begins when the worker engages in a principal activity. Donning and doffing safety gear (including protective clothing) required by the employer is a principal activity when it is an integral and indispensable part of the activities for which the worker is employed. Such requirements are common in manufacturing firms. However, under section 203(o) of the Act an employer need not compensate a worker for time spent in "changing clothes" (even if it is a principal activity) if that time is expressly excluded from compensable time under a bona fide collective bargaining agreement applicable to that worker.

The interrelated questions presented are:

(1) What constitutes "changing clothes" within the meaning of section 203(o)?

(2) If a worker's actions are a principal activity but fall within the scope of the section 203(o) exemption, do those actions nonetheless commence the period of time during which (aside from the clothes-changing time) the worker must be compensated?

(3) If a worker engages in a principal activity which is not exempted by section 203(o), but which involves only a *de minimis* amount of time, does the activity nonetheless commence the period of time during which the worker must be compensated?

PARTIES

The petitioners are approximately eight hundred current or former employees at the United States Steel's Gary (Indiana) Works and several other plants, who brought or joined this action asserting that their employer failed to compensate them for all the hours they worked, as required by the Fair Labor Standards Act.

The respondent is the United States Steel Corporation.

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Petitioners Clifton Sandifer, *et al.*, respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on May 8, 2012.

OPINIONS BELOW

The May 8, 2012 opinion of the Court of Appeals, which is reported at 678 F.3d 590 (7th Cir. 2012), is set out at pp. 1a-20a of the Appendix. The June 11, 2012 order of the Court of Appeals denying rehearing en banc, which is not reported, is set out at p. 82a of the Appendix. The January 5, 2010 Opinion and Order of the District Court for the Northern District of Indiana, which is unofficially reported at 2010 WL 61971 (N.D. Ind. Jan. 5, 2010), is set out at pp. 21a-33a of the Appendix. The October 15, 2009 Opinion and Order of the District Court for the Northern District of Indiana, which is unofficially reported at 2009 WL 3430222 (N.D. Ind. Oct. 15, 2009), is set out at pp. 34a-81a of the Appendix.

JURISDICTION

The decision of the Court of Appeals was entered on May 8, 2012. A timely petition for rehearing and rehearing en banc was denied on June 11, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATION INVOLVED

Section 203(o) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(o), provides:

> In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

Section 254(a) of 29 U.S.C., section 4 of the Portal-to-Portal Act, provides in pertinent part:

> Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938...on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947 –
>
> > (1) Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on which any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Section 790.8(c) of 29 C.F.R. provides in pertinent part:

> Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes [footnote], changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity.

(footnote omitted). The footnote (numbered 65), inserted following the phrase "certain clothes," provides in pertinent part:

> Such a situation may exist where the changing of clothes on the employer's premises is

required by law, by rules of the employer, or by the nature of the work.

STATEMENT OF THE CASE

In many industries workers are required to wear various forms of safety gear. Those requirements frequently derive from the Occupational Safety and Health Act. The lower courts are divided regarding how the time required to put on and take off the required safety items affects the workers' right to compensation under the Fair Labor Standards Act. This case presents the three inter-related circuit conflicts that have arisen involving this problem.

(1) This case arose primarily at the Gary Works of the United States Steel Corporation; several of the plaintiffs work at other U.S.Steel plants in Michigan or Illinois. The Gary Works is the largest integrated steel mill in North America. The plant occupies some 4,000 acres and employs approximately 5,000 workers, of whom 4,500 are production and maintenance workers represented by the United Steelworkers of America. The union workers enter the plant through one of seven assigned gates, go to one of several locker rooms where they put on safety gear, and then proceed to their work stations; at the end of the day the workers travel back to their assigned washroom and remove the safety gear, which remains at the plant. Because of the size of the plant, some workers travel to and from their work stations on buses.

The time which individual workers spent donning and doffing the safety gear, and traveling from the locker rooms to their work stations, is significant, and can total several hours per week. The amount of time varies significantly from worker to worker. U.S.Steel only pays the workers, however, for the time that they are at their work stations.

This action concerns whether under the Fair Labor Standards Act the workers are entitled to be paid as well for the time they spend putting on and taking off ("donning and doffing") their safety equipment (the donning and doffing claim) and the time they spend traveling between the locker rooms and their work stations (the travel-time claim). Because the workers spend 40 hours a week at their work stations, the donning and doffing time and the travel time – if compensable – would be overtime. (App. 38a).

The safety gear, all of which is worn on the person, includes three distinct types of items. First, there are three things that resemble ordinary clothing, but have special safety-related elements: fire retardant jackets, fire retardant pants, and metatarsal (steel toed) boots. Second, the workers wear protective items that would not usually be described as clothes and that are generally available and utilized in a wide variety of other circumstances: protective goggles, ear plugs, and hard hats. Third, the workers put on several types of safety gear that do not resemble ordinary clothing and that have been specially fashioned for the particular dangers of the

Gary Works steel plant: (1) a flame retardant or aluminized "snood," a head covering similar to the flash hood worn by Navy and Coast Guard gun crews, designed to protect the head and neck from flames and molten metal,[1] (2) a flame-retardant "wristlet," which covers the forearm from the elbow to the hand, and is designed to protect the wrist from flames or molten metal, and (3) flame-retardant spats, designed to prevent molten-metal from falling into the boots. (App. 4a-6a, 37a-38a). Most workers wear all of this equipment.

(2) Sandifer and several other employees at the Gary Works brought this action under the Fair Labor Standards Act in federal district court. Ultimately approximately 800 other current or former Gary Works employees joined in the collective action against United States Steel. The plaintiffs sought compensation for two types of time during which they had been at the Works but were not compensated: the time donning and doffing the safety gear and the time traveling between the locker rooms and their work stations.

United States Steel moved for summary judgment. The District Court granted summary judgment dismissing the donning and doffing claim, but refused to dismiss the travel-time claim.

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[1] There is a woman's bag-like device of the same name used to hold one's hair. A hair "snood" rhymes with "food"; the safety item in this case rhymes with "good."

The donning and doffing claim turns on the meaning of section 203(o) of the Fair Labor Standards Act. 29 U.S.C. § 203(o). Putting on and taking off required safety equipment would, at least ordinarily, be activities for which a worker would be entitled to compensation under the FLSA. 29 C.F.R. § 790.8(c). Section 203(o), however, states that where an applicable collective bargaining agreement so provides an employer need not compensate a worker for time spent "changing clothes." The collective bargaining agreement applicable to the plaintiffs in this case did not include compensation for the period when the workers don and doff the safety equipment. The controlling legal question is whether the donning and doffing of that safety equipment constitutes "changing clothes." The District Court held that all the safety equipment at issue constitutes "clothes" within the meaning of section 203(o). (App. 44a-50a). The court also concluded that the phrase "changing clothes" in section 203(o) is not limited to substituting one item for another (e.g., changing shoes), but also included putting on additional items (e.g., putting on wristlets, snoods).[2] (App. 50a-52a).

The travel-time claim turned on the interrelationship between section 203(o) and section 254(a), which provides that a worker must be compensated for time spent traveling between "principal

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[2] The plaintiffs asserted that they put on the flame retardant jacket and pants *over* their street clothes.

activities." 29 U.S.C. § 254(a). The district court concluded that the time spent donning and doffing the safety gear could constitute a "principal activity," so that the time spent traveling from the locker room to the individual work stations (and back) would be time traveling between principal activities. (App. 62a-64a). U.S.Steel argued, however, that if the donning and doffing was non-compensable under section 203(o), it necessarily followed that the travel time too must be non-compensable. The District Court rejected that contention. (App. 62a-64a).

On appeal[3] the Seventh Circuit upheld the dismissal of the donning and doffing claim and concluded that the travel-time claim should also have been dismissed.

The Court of Appeals held that special protective safety clothes, even if "different in kind from typical clothing," is still clothing within the meaning of section 203(o), expressly rejecting the Ninth Circuit's decision to the contrary in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), *aff'd on other grounds sub nom. IBP, Inc v. Alvarez*, 546 U.S. 21 (2005). (App.

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[3] The District Court certified under 28 U.S.C. § 1292(b) an interlocutory appeal by U.S.Steel regarding the travel-time issue. The Seventh Circuit on appeal also reviewed the District Court's determination regarding the donning and doffing issue, because plaintiffs' argument that the donning and doffing was not "changing clothes" under section 203(o) provided an alternative basis for affirming the District Court decision regarding the travel-time claim. (App. 3a).

10a) (quoting *Alvarez*). It also concluded, however, that not all of the safety gear in this case was "clothes" within the meaning of section 203(o). Under that provision, the appellate court held, "clothes" is limited to items that are "clothing in the ordinary sense," something that would generally be "regarded as an article of clothing." (App. 6a). Under that interpretation of section 203(o), the court of appeals concluded, the glasses and ear plugs (and perhaps the hard hat) were not clothes. The Seventh Circuit nonetheless held that the donning and doffing claim was properly dismissed, reasoning that time required to put on and take off the non-clothes items was *de minimis* and thus not compensable under the FLSA. (*Id.*).

The Seventh Circuit rejected the travel-time claim as well, holding that the district judge should have granted U.S.Steel's motion for summary judgment regarding that claim. It agreed that in the absence of section 203(o) the donning and doffing of the safety gear would have been a "principal activity" under section 254(a), which would have meant that the workers were entitled to be paid for the travel time between the locker rooms (where they put on and took off the gear) and their work stations. (App. 11a). But, the Court of Appeals held, in a case in which the donning and doffing is non-compensable because of section 203(o), the donning and doffing cannot constitute a "principal activity" under section 254(a). (App. 11a-17a). The Seventh Circuit expressly rejected the contrary holding of the Sixth Circuit in

Franklin v. Kellogg Co., 619 F.3d 604 (6th Cir. 2010). (App. 17a). In the instant case the Seventh Circuit itself had held that some of the donning and doffing (e.g., of the eye glasses and ear plugs) was not covered by section 203(o); it concluded, however, that the time required for putting on and taking off these non-clothes items was *de minimis*, and thus not sufficient to start the work day and render compensable the travel time at issue.

Plaintiffs filed a timely petition for rehearing en banc. The Court of Appeals denied the petition on June 11, 2012. (App. 82a).

REASONS FOR GRANTING THE WRIT

A large number of employers require their workers to wear safety gear while on the job. Those requirements are particularly important and common in plants that process raw materials, dangerous chemicals, or food. See *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005). At least ordinarily the Fair Labor Standards Act requires that workers be compensated for the time (unless *de minimis*) they spend donning and doffing such safety gear, as well as for the time the workers spend traveling from where they don and doff that gear to their work stations.

Unionized plants, however, are subject to a special provision which has given rise to widespread litigation in and disagreements among the lower courts. Under section 203(o), if an applicable collective

bargaining agreement so provides, an employer need not compensate workers for time spent "changing clothes." 29 U.S.C. § 203(o). The circuit courts are divided regarding three inter-related issues: (1) when if at all is donning and doffing safety gear "changing clothes" within the meaning of section 203(o); (2) if all of the donning and doffing is non-compensable under section 203(o), does it nonetheless constitute a "principal activity" under the FLSA and thus begin the continuous work day, so that travel time to and from an employee's work station must be compensated; and (3) can donning and doffing, even if it is not "changing clothes" within the meaning of section 203(o), constitute a principal activity if it requires only a *de minimis* amount of time.

This case presents all three circuit conflicts. The Seventh Circuit candidly acknowledged that "courts of appeals...have reached varied conclusion on the issues presented by this appeal" (App. 20a). The Court of Appeals below clearly recognized that its decision conflicted with decisions in the Ninth and Sixth Circuits, and expressed its emphatic disagreements with those other circuit courts. (App. 9a, 10a, 17a).

Many of the major unionized employers affected by these issues, including U.S.Steel, have plants in several different circuits, and thus may be subject to inconsistent legal standards. Several of the plaintiffs in this case work at a U.S.Steel plant in Ohio, where (had they filed suit there rather than joining the instant case) the Sixth Circuit decision in *Franklin* would have resulted in a favorable ruling on their

travel-time claim. The situation is in some circumstances compounded by the existence of national collective bargaining agreements, which may have differing legal consequences at different plants. These considerations give added force to the need to resolve these circuit conflicts.

I. There Is An Important Circuit Conflict Regarding The Scope of The "Changing Clothes" Provision in Section 203(o) of The Fair Labor Standards Act

The Seventh Circuit decision in the instant case exacerbates what was already an entrenched circuit conflict regarding the meaning of the phrase "changing clothes" in section 203(o). Four circuits hold that "clothes" includes anything that can be worn on the person, even "accessories." The Ninth Circuit has ruled that "special protective gear different in kind from typical clothing" is not clothes under section 203(o). *Alvarez*, 339 F.3d at 905. In the instant case the Seventh Circuit has adopted yet a third interpretation of section 203(o).

The Fourth, Sixth, Tenth and Eleventh Circuits hold that "clothes" includes anything an individual "wears," including any "accessories." *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1139 (10th Cir. 2011) ("all the garments and accessories worn by a person at any one time"); *Franklin v. Kellogg Co.*, 619 F.3d 604, 614 (6th Cir. 2010); *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 215 (4th Cir. 2009);

Anderson v. Cagle's, Inc., 488 F.3d 945, 955 (11th Cir. 2007). Thus the Tenth Circuit in *Salazar* held that knife scabbards are "clothes" because they are "quite similar to ordinary...holsters." 644 F.3d at 1140. In those circuits the controlling standard is whether a safety item is something the worker can "wear." In its appellate brief U.S.Steel urged the Seventh Circuit to adopt that construction of section 203(o), under which all of the safety gear in this case would constitute "clothes."[4]

The Seventh Circuit rejected that broad interpretation of section 203(o). The panel insisted "that not everything a person wears is clothing. We say that a person 'wears' glasses, or a watch,...but this just shows that 'wear' is a word of many meanings." (App. 7a). Applying this standard, the panel held that "clothes" does not include earplugs or safety glasses. (App. 6a). The Fourth, Sixth, Tenth and Eleventh Circuits, utilizing a decidedly broader definition of "clothes," have held, to the contrary, that safety glasses and ear plugs are indeed "clothes" under section 203(o). *Salazar,* 644 F.3d at 1134; *Franklin,* 619 F.3d at 614; *Sepulveda,* 591 F.3d at 216; *Anderson,* 488 F.3d at 949; see App. 18a (noting that the Labor Department's 2002 interpretation of "clothes" was "broader" than that adopted by the panel).

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[4] Reply/Response Brief of Defendant-Appellant/Cross-Appellee United States Steel Corp., pp. 12-22.

The Ninth Circuit applies a much narrower interpretation of section 203(o) "clothes." In that Circuit this term does not include "specialized protective gear...different in kind from typical clothing." 339 F.3d at 905. The Ninth Circuit utilizes a distinction drawn in OSHA regulations between ordinary clothing (including work clothes) and personal protective equipment, "materials worn by an individual to provide a barrier against exposure to workplace hazards." *Id.*; see 29 C.F.R. § 1910.1030(b).[5]

The Seventh Circuit rejected the Ninth Circuit holding in *Alvarez* that if an item is required and fashioned for safety reasons it necessarily cannot be "clothes" within the meaning of section 203(o). (App. 6a). Under the Seventh Circuit standard an item is "clothes" for purposes of section 203(o) if it would be "regarded as an article of clothing" (App. 6a) by "[a]lmost any English speaker." (App. 7a). The fact that the gear might have been fashioned in some special manner to serve a safety purpose – for example, the fact that the pants or jacket are flame retardant – does not remove that item from coverage as "clothes" under the decision below.

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[5] That regulation provides:

> Personal Protective Equipment is specialized clothing or equipment worn by an employee for protection against a hazard. General work clothes (e.g., uniforms, pants, shirts or blouses) not intended to function as protection against a hazard are not considered to be personal protective equipment.

The Seventh Circuit recognized that the Ninth Circuit had construed section 203(o) differently, holding in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), that the term "clothes" in section 203(o) does not apply to "special protective gear different in kind from typical clothing." 339 F.3d at 905. The Seventh Circuit commented that its interpretation of "clothes" did not "accord[ ] with...the outlier...Ninth Circuit's decision in *Alvarez*." (App. 10a). The Seventh Circuit acknowledged that the safety gear which the Ninth Circuit in *Alvarez* held was not section 203(o) "clothes" was "similar to those the steelworkers wear" in the instant case. (*Id.*). The Court of Appeals was sharply critical of the Ninth Circuit decision in *Alvarez*.

> The Ninth Circuit...thought it important that protective clothing...is "different in kind from typical clothing," which the court instanced by "warm clothing." [339 F.3d] at 905.... But that can't be the end of the analysis. Since workers very rarely change at work from street clothes into street clothes, section 203(o) would...be virtually empty if the Ninth Circuit were right.

(*Id.*). Similarly, the Sixth Circuit in *Franklin* candidly recognized that its construction of section 203(o) "is at odds with...the Ninth Circuit." 619 F.3d at 615. The Eleventh Circuit in *Anderson* "[a]cknowledged that our conclusion conflicts with the Ninth Circuit's opinion." 488 F.3d at 958.

In arriving at its interpretation of section 203(o), the Seventh Circuit insisted that that provision is not governed by the principle that exemptions from the Fair Labor Standards Act are to be narrowly construed. (App. 8a-9a). Section 203(o), the Court of Appeals insisted, is not an "exemption" at all. The Seventh Circuit expressly acknowledged that there is a circuit split regarding whether or not section 203(o) creates an "exemption" from the FLSA, and is thus subject to the narrow construction rule.

> Section 203(o) creates an exclusion rather than an exemption, as all but one appellate decision to address the issue has held. See *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1138 (10th Cir. 2011); *Franklin v. Kellogg Co.*, 619 F.3d 604, 611-12 (6th Cir. 2010); *Allen v. McWane, Inc.*, 593 F.3d 449, 458 (5th Cir. 2010); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 957-58 (11th Cir. 2007).
>
> The outlier is *Alvarez v. IBP, Inc.*, *supra*, 339 F.3d at 905....

(App. 9a). The Seventh Circuit was harshly critical of the contrary Ninth Circuit's *Alvarez* in this regard. "[T]he Ninth Circuit seemed to have forgotten that subsection (o) of section 203 is not found in the section of the FLSA that creates exemptions." (App. 10a).

II. There Is An Important Circuit Conflict Regarding Whether Section 203(o) Exempt Donning and Doffing Can Constitute A "Principal Activity" Under Section 254(a) and Thus Start The Beginning of A Work Day

The lower courts are also divided regarding whether section 203(o) affects whether "changing clothes" within the scope of that provision can mark the beginning (and end) of a work day, thus entitling the employee to compensation for the period that follows.

Under section 254(a), a worker is entitled to compensation for time spent "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform." 29 U.S.C. § 254(a)(1). Any action required of a worker is a "principal activity" if it is an "integral and indispensable part of the principal activities" for which the employee is employed. *Steiner v. Mitchell,* 350 U.S. 247, 252-53 (1956). Once a worker has engaged in a principal activity, all subsequent walking and other travel is outside the scope of section 254(a)(1) until the end of the work day, similarly delineated by the occurrence of the last "principal activity." In the instant case the plaintiffs contended that donning and doffing the safety gear constituted a principal activity under section 254(a)(1), thus entitling the plaintiffs to compensation for time that they thereafter spent traveling to and from their work stations.

The Seventh Circuit agreed that donning and doffing required safety equipment (at least but for

section 203(o)) would be a principal activity. "If an employer requires his employees to don and doff work clothes at the workplace, then donning and doffing are an integral and indispensable part of the workers' main activity...and therefore a principal activity." (App. 12a). Absent section 203(o), the lower court agreed, the plaintiffs would have been entitled to compensation for their travel time. The Court of Appeals acknowledged that "[h]ad the clothes-changing time in this case not been rendered noncompensable pursuant to section 203(o), it would have been a principal activity." (App. 11a).

The panel held, however, that donning and doffing that would otherwise constitute a principal activity is not a principal activity under section 254(a)(1) if it is noncompensable under section 203(o). (App. 11a-18a). The panel reasoned that because section 203(o) controls whether a worker is "employed" under section 206 and 207, it logically must also determine whether the worker is engaged in a principal activity under section 254(a)(1).

> [T]he employer and the union decided...that changing time is not work time and need not be compensated. If it is not work time...how can it be one of the "principal...activities which [the] employee is employed to perform"? [H]e is not employed to...change clothes.

(App. 11a-12a; see *id.* 13a ("[s]ection 203(o) permits the parties to a collective bargaining agreement to reclassify changing time as nonworking time")).

The Seventh Circuit candidly acknowledged that its interpretation of the interrelationship between sections 203(o) and 254(a) had been expressly rejected by the Sixth Circuit.

> In *Franklin v. Kellogg Co.*, 619 F.3d 604, 618-19 (6th Cir. 2010), as in this case, the employer, invoking section 203(o), did not pay its workers for time spent changing into work clothes. The court concluded nevertheless that changing time, because required by the employer, was a "principal activity."

(App. 17a). "[B]y disagreeing with *Franklin* we...create an inter-circuit conflict." (*Id.*). The Court of Appeals was sharply critical of the Sixth Circuit's decision in *Franklin*. "This seems clearly wrong...and the *Franklin* opinion offers only a conclusion, not reasons." (*Id.*).

Conversely, the Sixth Circuit in *Franklin* noted that "'[t]he courts have taken divergent views' on the issue of whether activities deemed excluded under § 203(o) may still constitute 'principal activities.'" 619 F.3d at 618. That circuit reasoned that "Section 203(o) relates to the *compensability* of time spent donning [and] doffing.... It does not render such time any more or less integral or indispensable to an employee's job." *Id.* (quoting *Andrako v. U.S.Steel Corp.*, 632 F.Supp.2d 398, 413 (W.D. Pa. 2009) (emphasis in original)).

This conflict is of great importance to the practical consequences of section 203(o). If, as the several

courts of appeals have held, the donning and doffing of safety gear is within the scope of section 203(o), workers who put on such items at large plants will often if not ordinarily travel for a significant period of time to reach their work station.

III. The Decision of The Seventh Circuit Conflicts With The Decision of The First Circuit in *Tum v. Barber Foods, Inc.*, and The Decision of This Court in *IBP, Inc. v. Alvarez*

The Seventh Circuit correctly acknowledged that the donning and doffing of required safety gear, if outside the scope of section 203(o), would constitute a principal activity and therefore entitle a worker to compensation for travel time that occurred after he or she put on, and until he or she took off, such items. The Court of Appeals also held that at least some of the safety equipment in the instant case did not constitute "clothing" within the scope of section 203(o). The court below nonetheless held that the plaintiffs were not entitled to compensation for travel time after they donned, and before they doffed, those non-clothes items.

That holding is inconsistent with this Court's decision in *IBP, Inc. v. Alvarez,* and with the First Circuit decision in *Tum v. Barber Foods, Inc.*, 331 F.3d 1 (1st Cir. 2003), which in this Court was consolidated and decided with *Alvarez.* In *Tum* the workers at a poultry processing plant were required to put on certain safety equipment (including, as in the instant

case, safety glasses and ear plugs[6]) at the beginning of the work day. The district court concluded that donning and doffing that equipment was a principal activity, but at trial the jury concluded that the donning and doffing were non-compensable because the amount of time involved was *de minimis*. 546 U.S. at 39. This Court nonetheless held that workers were entitled to compensation for the walking time that followed the donning (or picking up of) that equipment. 546 U.S. at 527.

The question of whether a *de minimis* principal activity could trigger the start of the work day – thus rendering compensable any subsequent travel – was expressly before this Court in *Alvarez*. In the earlier First Circuit proceedings, Chief Judge Boudin, in a concurring opinion, had argued that the donning of required equipment ought not constitute a principal activity, thus rendering compensable subsequent walking time, if the time required to put on that equipment was *de minimis*. *Tum v. Barber Foods, Inc.*, 360 F.3d 274, 285-86 (1st Cir. 2004) (en banc) (concurring opinion). The government successfully argued in this Court that "th[e] de minimis rule...has nothing to do with whether an activity begins or ends the workday for purposes of the Portal Act."[7] As the United States

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[6] See *Tum v. Barber Foods, Inc.*, 331 F.3d 1, 6 (1st Cir. 2003).

[7] Brief for the United States as Amicus Curiae, No. 04-66, p. 25, available at 2005 WL 1185927. This issue was also addressed in the Brief for Petitioner, pp. 41-46, available at 2005

(Continued on following page)

pointed out in that brief, under the terms of the Department of Labor regulations principal activity involving "any amount of time" will begin the work day under the Portal-to-Portal Act. See 29 C.F.R. 790.8(b) n.63. The Department of Labor filed this brief during the Bush administration, and its position on this issue has not varied.

The Seventh Circuit expressed disapproval for the very idea that a worker could be entitled to compensation for time traveling from a locker to his or her place on the production line. "Employers could emasculate...the 'primary activity' provision by placing the locker rooms *in* the work stations, for then there would be no post-primary-activity travel time.... What sense would that make?" (App. 14a) (emphasis in original). "There is something amiss with an interpretation that implies that the location of the locker room...determines one's statutory entitlement to compensation." (*Id.*). This very objection, however, was made by one of the lower court opinions in *Tum*,[8] and was unsuccessfully advanced in this Court by both employers.[9]

WL 1185926, and the Brief of the National Chicken Council as Amicus Curiae, pp. 22-25, available at 2005 WL 1841384.

[8] *Tum v. Barber Foods, Inc.*, 360 F.3d 274, 280 (majority opinion), 285 (Boudin, C.J., concurring) (1st Cir. 2004) (en banc); *Tum v. Barber Foods, Inc.*, 331 F.3d 1, 6 (1st Cir. 2003).

[9] Brief for Respondent, No. 04-66, pp. 40-41, available at 2005 WL 1841383; Brief for Petitioner, No. 03-1238, pp. 32-36, available at 2005 WL 1185925.

IV. The Decision of The Seventh Circuit Is Clearly Incorrect

(1) The Ninth Circuit correctly concluded in *Alvarez* that the "clothes" referred to in section 203(o) do not include safety gear intended to protect the wearer from some unusual workplace hazard.

In ordinary parlance "clothes" refers to items people put on to deal with the common needs and interests of dressing on a day to day basis: assuring modesty, providing protection from normal variations in temperature, creating a particular appearance, and responding to the likely degree of dirt or precipitation to be encountered. In that sense people change clothes because they are going out to dinner, because they are going to garden, or because the temperature has gotten hotter or colder. Similarly, an employee might change clothes to create a particular appearance (e.g., a police officer's uniform) or to work in a dirty environment without soiling one's street clothes (e.g., a garage mechanic's coverall). This use of "changing clothes" is far different from putting on special protective gear like a hazmat suit, a beehive keepers suit, or a deep sea diver's suit. It would, at the least, be odd to describe those events as "changing clothes."

The Ninth Circuit decision establishes a workable rule, declining to treat safety gear as clothes if they are intended to guard against some workplace hazard unlike the problems of ordinary life. The majority rule, insisting on treating as clothes anything

that a worker can "wear," implausibly includes all sorts of things no one would describe as clothes, such as glasses, earplugs, respirators, or even hazmat suits. The Seventh Circuit rule, though less extreme, entails intractable problems of interpretation. In this case, for example, a court would have to decide whether ordinary English speakers would label as clothes such things as a "snood" or "wristlet" – devices so novel that the employer had to invent names for them – and to decide when the safety modifications of a particular item had gone so far that it would no longer be described as clothes in ordinary conversation. In the poultry industry, for example, aprons and gloves are made of the modern equivalent of chain mail. The Ninth Circuit rule in *Alvarez* avoids these difficulties.

In addition, much of the safety gear that would be treated as "clothes" under the majority and Seventh Circuit standards is put on over, or added to, street clothes. In the instant case plaintiffs contend that is true of all the items in question except the boots. Because of the different manner in which safety gear is used, the lower courts which treat these items as "clothes" have been forced to hold that putting on an *additional* item – rather than, for example, substituting work pants for street pants – is changing clothes. Thus in most circuits putting in ear plugs is "changing clothes," and in the Seventh Circuit putting on a "snood" is "changing clothes." That conclusion is clearly inconsistent with ordinary usage.

(2) Whether donning and doffing fall within the scope of section 203(o) is irrelevant to whether those actions constitute principal activities under section 254(a).

Section 203(o) expressly states that a collective bargaining agreement that changing clothes (or washing) is not to be compensated is controlling "[i]n determining for the purposes of section 206 and 207 of this title the hours for which an employee is employed." 29 U.S.C. § 203(o). Section 203(o) by its own terms simply does not apply or even refer to determinations under section 254(a)(1) as to whether an employee is engaged in a principal activity. When Congress wanted to permit the terms of a collective bargaining agreement to control whether a worker's actions could constitute a "principal activity" for purposes of section 254(a)(1), it did so expressly. Congress included just such a provision in section 254(a), but it is limited to the use of a collective bargaining agreement to determine whether a worker engages in a principal activity when, on the way to or from work in an employer owned vehicle, he or she does some "incidental" work.

> *For the purposes of this subsection,* the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the

> employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

29 U.S.C. § 254 (emphasis added).

The panel also reasoned that the amendments to the FLSA gave labor and management negotiators blanket authority to "determine[ ]...what is compensable work in borderline cases," such as the question of whether "walking from a locker room to a work station [is] 'work.'" (App. 15a). But neither the FLSA, the Portal-to-Portal Act, nor any other amendment to the FLSA gives to labor and management negotiators any such general authority to decide – in place of the federal courts that ordinarily are responsible for applying federal statutes and regulations – what constitutes compensable work in "borderline cases." The FLSA and its amendments permit an employer's FLSA responsibilities to be affected by a collective bargaining agreement only in limited and highly specific circumstances. In addition to sections 203(o) and 254(a), seven other narrowly framed provisions of the FLSA provide that an employer's responsibilities may be reduced, or expanded, by an agreement with an authorized union.[10] But none of these provisions

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[10] 29 U.S.C. §§ 203(m) (exclusion of board and lodging from wage), 207(b)(1) (exemption from overtime requirement), 207(b)(2) (same), 207(e)(7) (calculation of regular rate), 207(f) (exemption from overtime requirement), 207(o)(2)(A)(i) (compensatory time

(Continued on following page)

includes the compensability of travel time within an employer's premises as one of the issues that can be affected by a collective bargaining agreement. (And in no instance does the applicability of any such provision turn on whether the matter affected involved a "borderline" issue). The very specificity of these limited provisions makes it emphatically clear that Congress did not intend collective bargaining agreements to alter in any other circumstances a worker's entitlement to compensation. The Congress which enacted section 203(o) expressly rejected a proposal to give management and labor negotiators general authority to bargain away rights otherwise granted by the FLSA.[11]

(3) The decision of the Court of Appeals that the *de minimis* donning and doffing of non-clothes items outside the scope of section 203(o) does not entitle workers to compensation for travel time that occurs between the donning and doffing is squarely contrary to this Court's decision in *Alvarez*.

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in lieu of overtime), 254(b) (compensation not otherwise required by Portal-to-Portal Act).

[11] That legislative history is described in the Department of Labor 2010 Opinion Letter, 2010 WL 12468195.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

Nos. 10-1821, 10-1866

CLIFTON SANDIFER, *et al.*,

Plaintiffs-Appellees/
Cross-Appellants,

v.

UNITED STATES STEEL CORPORATION,

Defendant-Appellant/
Cross-Appellee.

Appeals from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 2:07-cv-00443-RLM-PRC –
Robert L. Miller, Jr. *Judge*

ARGUED FEBRUARY 15, 2012 – DECIDED MAY 8, 2012

Before POSNER, FLAUM, and MANION, *Circuit Judges*.

POSNER, *Circuit Judge*. These appeals arise out of a class action (technically a "collective action," as it is brought pursuant to 29 U.S.C. § 216(b), a part of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq.*, rather than pursuant to Fed. R. Civ. P. 23) on

behalf of 800 former and current hourly workers at U.S. Steel's steel works in Gary, Indiana. The plaintiffs argue that U.S. Steel has violated the Act by failing to compensate them for the time they spend in putting on and taking off their work clothes in a locker room at the plant ("clothes-changing time") and in walking from the locker room to their work stations, and back again at the end of the day ("travel time"). The collective bargaining agreement between U.S. Steel and the steelworkers union does not require compensation for such time, and apparently none of the previous collective bargaining agreements between U.S. Steel and the union since 1947, nine years after the FLSA was enacted, required it either. But the plaintiffs argue that the Act itself requires compensation; and if it does, it overrides any contrary contractual provision. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740-41 (1981).

The district judge ruled that the Fair Labor Standards Act does not require that the clothes-changing time in this case be compensated, but that the Act may require that the travel time be compensated and he therefore refused to dismiss the suit. But he certified the issue of the compensability of the travel time for an interlocutory appeal under 28 U.S.C. § 1292(b) by U.S. Steel, and we accepted the appeal.

The plaintiffs have cross-appealed. They want to challenge the district judge's ruling that clothes-changing time is not compensable. U.S. Steel points out that the cross-appeal doesn't satisfy the procedural

standard for an appeal under section 1292(b) because the plaintiffs did not ask either the district judge or us for leave to appeal. So we hereby dismiss the cross-appeal. But the dismissal has no practical significance. For if the ruling on clothes-changing time was erroneous, the plaintiffs' case for compensation for travel time is, as we'll see, irrefutable. And so they can certainly argue, in opposition to the appeal, that the ruling was indeed erroneous.

So on to the merits – and it will simplify exposition to start with the clothing issue. The Fair Labor Standards Act requires that workers be paid at least the federal minimum wage for all hours worked, and time and a half for hours worked over 40 hours in a week. But the statute does not define "work," a critical hole that the courts must fill – critical because the Act covers an immense variety of kinds of workplace, and by expanding the meaning of "work" courts could overrule agreements negotiated between labor and management and create unforeseen retroactive liabilities. To cut back on Supreme Court decisions believed to have done this, Congress in 1947 passed the Portal-to-Portal Act, 29 U.S.C. §§ 251 *et seq.*, and two years later, in the spirit of that Act, added section 3(o) to the Fair Labor Standards Act, 29 U.S.C. § 203(o). That section excludes, from the time during which an employee is entitled to be compensated at the minimum hourly wage (or, if it is overtime work, at 150 percent of his hourly wage), "any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured

working time . . . by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee." *Id.* ("Washing time" is not at issue in this case, however.) The plaintiffs argue that the section is inapplicable because what the district court deemed "clothes" are not clothes within the meaning of the Act, but rather safety equipment. The statute does not define "clothes."

The alleged clothes consist of flame-retardant pants and jacket, work gloves, metatarsal boots (work boots containing steel or other strong material to protect the toes and instep), a hard hat, safety glasses, ear plugs, and a "snood" (a hood that covers the top of the head, the chin, and the neck). These work clothes are in the record, and since a picture is worth a thousand words, here is a photograph of a man modeling the clothes:

[Picture Appears On Opposite Page]

The glasses and ear plugs are not clothing in the ordinary sense but the hard hat *might* be regarded as an article of clothing, and in any event putting on the glasses and the hard hat and putting in the ear plugs is a matter of seconds and hence not compensable, because *de minimis*. "Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946); *see also Frank v. Wilson & Co.*, 172 F.2d 712, 715-16 (7th Cir. 1949); *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 372-75 (4th Cir. 2011); *id.* at 376-81 (concurring opinion); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 903-04 (9th Cir. 2003), affirmed under the name of *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

The rest of the outfit certainly *seems* to be clothing, but the plaintiffs argue, no, it's "personal protective equipment." Actually it's both. Protection – against sun, cold, wind, blisters, stains, insect bites, and being spotted by animals that one is hunting – is a common function of clothing, and an especially common function of work clothes worn by factory workers. It would be absurd to exclude all work clothes that have a protective function from section 203(o), and thus limit the exclusion largely to actors' costumes and waiters' and doormen's uniforms. Remember that the section covers not only clothes-changing time but also washing-up time, and workers

who wear work clothes for self-protection in a dangerous or noxious work environment are far more likely to require significant time for washing up after work than a waiter.

It's true that not everything a person wears is clothing. We say that a person "wears" glasses, or a watch, or his heart on his sleeve, but this just shows that "wear" is a word of many meanings. Almost any English speaker would say that the model in our photo is wearing work clothes. Given the subject matter of the Fair *Labor* Standards Act it would be beyond odd to say that the word "clothes" in section 203(o) excludes work clothes, especially since the section is about changing into and out of clothes at the beginning and end of the workday. Not all workers wear work clothes, but workers who change at the beginning and end of the workday are changing into and out of work clothes, and if they are governed by a collective bargaining agreement that makes such changing noncompensable the agreement must apply to work clothes, for otherwise the noncompensation provision would have virtually no applications.

The fact that the clothing exclusion is operative only if it is agreed to in collective bargaining implies, moreover, that workers *are* compensated for the time they spend changing into work clothes, and washing up and changing back. "Section 203(o) permits unions and management to trade off the number of compensable hours against the wage rate; the workers get more, per hour, in exchange for agreeing to exclude some time from the base." *Spoerle v. Kraft Foods*

Global, Inc., 614 F.3d 427, 428 (7th Cir. 2010). The steelworkers would not have given up their statutory entitlement to time and a half for overtime, when changing clothes or traveling to and from their work stations, without receiving something in return; and they will get to keep that compensation until the next collective bargaining agreement goes into effect, in addition to the back pay they're demanding, if they convince us that "clothes" don't include the work clothes worn by steelworkers at the Gary plant.

From a worker's standpoint any time spent on the factory grounds is time "at work" in the sense of time away from home or some other place where he might prefer to be if he weren't at work. But it is not time during which he is making steel, and so it is not time for which the company will willingly pay. If the workers have a legal right to be paid for that time, the company will be less willing to pay them a high wage for the time during which they are making steel; it will push hard to reduce the hourly wage so that its overall labor costs do not rise. The steel industry is international and highly competitive, and unions temper their wage demands to avoid killing the goose that lays the golden eggs. They don't want the American steel industry to go where so much American manufacturing has gone in recent years – abroad. The plaintiffs are adverse to their union, to the interests of other steelworkers, and to their own long-term interests.

The plaintiffs cite language from a number of cases to the effect that "exemptions" from the Fair

Labor Standards Act are to be construed narrowly. E.g., *Moreau v. Klevenhagen*, 508 U.S. 22, 33 (1993); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). We expressed skepticism in *Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 508 (7th Cir. 2007), asking rhetorically: "Why should one provision in a statute take precedence over another?" No matter; section 203(o) does not create an exemption. The Fair Labor Standards Act has a section entitled "Exemptions"; it is 29 U.S.C. § 213; the exclusion of changing time is not in that section.

This is more than a quibble. There's a difference between exclusion and exemption, or, equivalently, between scope and coverage. The FLSA does not apply to American workers abroad. Or to soldiers. Or to certain people who volunteer for particular kinds of charitable work. These exclusions help to define the scope of the Act. That scope is defined in 29 U.S.C. § 203, which is entitled "Definitions" and is where we find the provision concerning compensation for clothes-changing time, rather than in section 213, where instead we find exemptions for certain types of worker, such as certain agricultural workers. Section 203(o) creates an exclusion rather than an exemption, as all but one appellate decision to address the issue has held. *See Salazar v. Butterball, LLC*, 644 F.3d 1130, 1138 (10th Cir. 2011); *Franklin v. Kellogg Co.*, 619 F.3d 604, 611-12 (6th Cir. 2010); *Allen v. McWane, Inc.*, 593 F.3d 449, 458 (5th Cir. 2010); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 957-58 (11th Cir. 2007).

The outlier is *Alvarez v. IBP, Inc.*, *supra*, 339 F.3d at 905 (the affirmance of the decision by the Supreme Court was on other grounds). But as the *Anderson* decision points out, 488 F.3d at 957, the Ninth Circuit seemed to have forgotten that subsection (o) of section 203 is not found in the section of the FLSA that creates exemptions. The Ninth Circuit also thought it important that protective clothing (the workers in question were employed in a meat-packing plant and were required to wear protective work clothes similar to those the steelworkers wear, *see* 339 F.3d at 898 n. 2) is "different in kind from typical clothing," which the court instanced by "warm clothing." *Id.* at 905. But this was just to say that work clothes are not street clothes. That can't be the end of the analysis. Since workers very rarely change at work from street clothes into street clothes, section 203(o) would as we said be virtually empty if the Ninth Circuit were right.

So the district judge was correct to rule that, given the terms of the collective bargaining agreement, U.S. Steel doesn't have to compensate its workers for the time they spend changing into and out of their work clothes. We add that the ruling accords with all but one reported appellate decision, and again the outlier is the Ninth Circuit's decision in *Alvarez*. *See Salazar v. Butterball, LLC*, *supra*, 644 F.3d at 1136-41; *Franklin v. Kellogg Co.*, *supra*, 619 F.3d at 610-16; *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 214-18 (4th Cir. 2009); *Anderson v. Cagle's, Inc.*, *supra*, 488 F.3d 945, 955-58 (11th Cir.

2007); *Bejil v. Ethicon, Inc.*, 269 F.3d 477, 480 n. 3 (5th Cir. 2001) (per curiam). And in *Spoerle v. Kraft Foods Global, Inc., supra*, 614 F.3d at 428, we adopted Sepulveda's reasoning and conclusion without undertaking a separate analysis.

But the judge's ruling that the clothes-changing time isn't compensable makes his ruling that the company must compensate the plaintiffs for travel time puzzling and paradoxical (which is why, as we said earlier, the plaintiffs were entitled to argue against the judge's ruling on clothes-changing time without having to cross appeal). The Portal-to-Portal Act exempts from the minimum wage and overtime provisions of the Fair Labor Standards Act "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform." 29 U.S.C. § 254(a). Had the clothes-changing time in this case not been rendered noncompensable pursuant to section 203(o), it would have been a principal activity. But unless changing into and changing out of work clothes are principal activities even when made noncompensable pursuant to section 203(o), the exemption in section 254(a) applies, and U.S. Steel need not compensate for travel time.

The judge thought that clothes-changing time could be a "principal activity" even though the employer and the union had decided, as he agreed they were entitled to do, that changing time is not work time and need not be compensated. If it is not work time – the workers aren't being paid and their union

has agreed to their not being paid – how can it be one of the "principal . . . activities which [the] employee is employed to perform"? He is required to wear work clothes, and for that matter he is required to show up for work. But he is not employed to show up or employed to change clothes. Not all requirements imposed on employees constitute employment. An employee may be required to call in when he is sick, but unless he is on paid sick leave he is not paid for the time it takes to place the call.

In *Steiner v. Mitchell*, 350 U.S. 247, 252-53 (1956), the Supreme Court held that the term "principal activity or activities" included all activities that are an "integral and indispensable part of the principal activities" for which the employee is employed, and the Court reaffirmed that ruling in *IBP, Inc. v. Alvarez, supra*, 546 U.S. at 37. If an employer requires his employees to don and doff work clothes at the workplace, then donning and doffing are an integral and indispensable part of the workers' main activity (in this case, making steel) and therefore a principal activity. *Steiner v. Mitchell, supra*, 350 U.S. at 256. *Alvarez* held that when this is the case the time the worker spends walking from the locker room to the worksite is not time walking to and from a principal activity, but instead time walking *between* principal activities, and so is not within the exemption created by the Portal-to-Portal Act, just as if the worker were a millwright who inspects, repairs, replaces, installs, adjusts, and maintains mechanical equipment in different parts of the steel mill and to

do these tasks must walk from one piece of equipment to another. *See IBP, Inc. v. Alvarez, supra*, 546 U.S. at 37.

But the Court in *Steiner* thought it significant that there was no collective bargaining agreement that made clothes-changing time noncompensable. The Court remarked "the clear implication" of section 203(o) "that clothes changing and washing, which are *otherwise* a part of the principal activity, may be expressly excluded from coverage by agreement." *Steiner v. Mitchell, supra*, 350 U.S. at 255 (emphasis added). That is what happened in this case. Section 203(o) permits the parties to a collective bargaining agreement to reclassify changing time as nonworking time, and they did so, agreeing that the workday would not start when the workers changed their clothes; it would start when they arrived at their work site. If clothes-changing time is lawfully not compensated, we can't see how it could be thought a principal employment activity, and so section 254(a) exempts the travel time in this case.

As with clothes-changing time, workers would not benefit in the long run from a rule that travel time must be compensated. It would mean that in an 8-hour shift (the hourly workers at the Gary steel works work 8-hour shifts), the employer would not obtain eight hours of productive work; he would be paying the same wage and getting less work in return (or getting the same work but paying time and ha[illegible] overtime for the workers' travel time), and so the wage would have to fall the next time the collective

bargaining agreement was renegotiated unless the laws of economics were repealed. Employers would also be moved to limit the time they allowed their workers for travel (which would require more supervisors and cause disputes) and perhaps to reduce travel time further by moving the locker rooms closer to the work stations. These measures would spell higher costs for the employer – higher *labor* costs. The higher such costs are, the lower the hourly wage will be. And so the higher costs would be borne ultimately by the workers.

Employers could emasculate the plaintiffs' interpretation of the "primary activity" provision by placing the locker rooms *in* the work stations, for then there would be no post-primary-activity travel time. There is something amiss with an interpretation that implies that the location of the locker room, rather than the amount of time involved in walking to one's work station, determines one's statutory entitlement to compensation. Suppose it is 100 yards from the plant entrance to the locker room and another 100 yards to the work station. On the plaintiffs' view, traversing the second 100 yards is compensable, though traversing the first 100 yards is not, but if the locker room were adjacent to the work station none of the workers' travel time would be compensable even though the amount of walking they'd be doing would be identical. What sense could that make?

It was concern with the disruption of the workplace caused by forcing employers to compensate for

travel time and clothes-changing time, as the Supreme Court held they must do in *Anderson v. Mt. Clemens Pottery Co., supra*, 328 U.S. at 690-92; *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 163-64 (1945); and *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944), that drove the enactment of sections 203(o) and 254(a). *IBP, Inc. v. Alvarez, supra*, 546 U.S. at 25-26; *Sepulveda v. Allen Family Foods, Inc., supra*, 591 F.3d at 217; *Anderson v. Cagle's, Inc., supra*, 488 F.3d at 957-58; *Adams v. United States*, 471 F.3d 1321, 1324-25 (Fed. Cir. 2006); *Thomas v. Howard University Hospital*, 39 F.3d 370, 371-72 (D.C. Cir. 1994). "The FLSA . . . does not define the terms 'work' or 'workweek.' The Supreme Court defined these terms 'broadly' in its early FLSA cases . . . defined them so broadly, in fact, that Congress found it necessary to amend the statute to restore some sanctity to private employment contracts." *Sepulveda v. Allen Family Foods, Inc., supra*, 591 F.3d at 217.

This history provides guidance to the meaning of "clothes" and "principal activity" by showing that Congress was trying to eliminate the disruptions that the Court's interpretation of the Fair Labor Standards Act had caused, and to allow the determination of what is compensable work in borderline cases (is changing into work clothes "work"? is walking from a locker room to a work station "work"?) to be settled by negotiation between labor and management. As the

preamble to the Portal-to-Portal Act states, rather dramatically,

> The Congress finds that the Fair Labor Standards Act of 1938 . . . has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees

> for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; [and] (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created. . . .

29 U.S.C. § 251(a).

Only one previous appellate case has decided whether noncompensable changing time can be work time for purposes of the travel-time exemption. In *Franklin v. Kellogg Co.*, 619 F.3d 604, 618-19 (6th Cir. 2010), as in this case, the employer, invoking section 203(o), did not pay its workers for time spent changing into work clothes. The court concluded nevertheless that changing time, because required by the employer, was a "principal activity." This seems clearly wrong, for the reasons we've explained (and the *Franklin* opinion offers only a conclusion, not reasons). But because by disagreeing with *Franklin* we would create an inter-circuit conflict, we have circulated this opinion to the full court in advance of publication. 7th Cir. R. 40(e). None of the judges in regular active service voted to hear the case en banc. (Judge Williams did not participate in the Rule 40(e) consideration of the matter.)

The Department of Labor has participated as an amicus curiae in this appeal on the side of the plaintiffs, and we end by considering what weight we

should give its views. During the Clinton Administration the Department took a narrow view of the meaning of the term "clothes" for purposes of determining whether time spent in changing in and out of work clothes could be excluded under section 203(o) from the FLSA's minimum wage and overtime provisions. *See* U.S. Dep't of Labor, Opinion Letter, 2001 WL 58864 (Jan. 15, 2001); Opinion Letter, 1997 WL 998048 (Dec. 3, 1997). During the Bush Administration the Department took a broad view – broader than we take – of what "clothes" means in the FLSA, and added that clothes-changing time excluded under section 203(o) could not be a "principal activity" under the Portal-to-Portal Act. U.S. Dep't of Labor, Opinion Letter, 2007 WL 2066454 (May 14, 2007); Opinion Letter, 2002 WL 33941766 (June 6, 2002). After the change in administrations in 2009 the Department reverted to the Clinton Administration's position on "changing clothes" and also rejected the Bush Administration's position on "principal activity." U.S. Dep't of Labor, Administrator's Interpretation No. 2010-2, 2010 WL 2468195 (June 16, 2010). Such oscillation is a normal phenomenon of American politics. Democrats are friendlier to unions than Republicans are, though we cannot see how a decision in favor of the plaintiffs in this case would help unions. (No union is a party to this case or an amicus curiae.)

Naturally the Department of Labor does not acknowledge that its motive in switching sides was political; that would be a crass admission in a brief or in oral argument, and unlikely to carry weight with

the judges. The Department says instead that it is right as a matter of law and that the position the Department took in the Bush years is wrong; it adds that since it enforces the Fair Labor Standards Act its (current) position should carry weight with us. But all the Department does to demonstrate the "rightness" of its current position is to echo the plaintiffs' arguments. Nowhere in the Department's brief is there a reference to any institutional knowledge of labor markets possessed by the Department's staff – or to anything indeed to which the parties might not have complete access – that might help the court to decide the case sensibly; and at the oral argument the Department's lawyer acknowledged this void. All that the Department has contributed to our deliberations, therefore, though it is not quite nothing, is letting us know that it disagrees with the position taken by the Bush Department of Labor; for if it were silent, from which one might infer that it agreed with that position, it would be inviting U.S. Steel to argue that the Department of Labor had been consistent, at least since 2001, and thus across Administrations controlled by opposite political parties, in rejecting the plaintiffs' position.

It would be a considerable paradox if before 2001 the plaintiffs would win because the President was a Democrat, between 2001 and 2009 the defendant would win because the President was a Republican, and in 2012 the plaintiffs would win because the President is again a Democrat. That would make a travesty of the principle of deference to interpretations

of statutes by the agencies responsible for enforcing them, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987), since that principle is based on a belief either that agencies have useful knowledge that can aid a court or that they are delegates of Congress charged with interpreting and applying their organic statutes consistently with legislative purpose. We are not surprised to discover that courts of appeals that have reached varied conclusions on the issues presented by this appeal have come together in spurning, as Judge Wilkinson has put it, "the gyrating agency letters on the subject." *Sepulveda v. Allen Family Foods, Inc., supra*, 591 F.3d at 216 n. 3; *see also Salazar v. Butterball, LLC, supra*, 644 F.3d at 1139; *Franklin v. Kellogg Co., supra*, 619 F.3d at 612-14; *Alvarez v. IBP, Inc., supra*, 339 F.3d at 905 n. 9; contra, *Anderson v. Cagle's, Inc., supra*, 488 F.3d at 956-57.

We resolve the specific issue that we have been asked to resolve in this interlocutory appeal in favor of U.S. Steel. On the basis of that resolution, the suit has no merit and should be dismissed by the district court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CLIFTON SANDIFER, et al., Plaintiffs	)	
vs.	)	CAUSE NO.
UNITED STATES STEEL CORP., Defendant.	)	2:07-CV-443 RM

OPINION and ORDER

(Filed Jan. 5, 2010)

On October 15, 2009, the court granted in part and denied in part United States Steel Corporation's summary judgment motion. The court granted U.S. Steel's request for judgment pursuant to 29 U.S.C. § 203(o), concluding that the plaintiffs' activities of changing clothes and showering at the beginning and end of their shifts were excluded from measured working time by the express terms of, or by a custom or practice under, the applicable collective-bargaining agreement(s); denied U.S. Steel's request for judgment based on the de minimis doctrine and the grievance and arbitration procedures of the applicable CBA; and denied U.S. Steel's request for judgment under 29 U.S.C. § 254(a) because the court couldn't conclude "as a matter of law that the non-compensability of donning, doffing, and showering activities under 29 U.S.C. § 203(o) excludes consideration of whether, pursuant to 29 U.S.C. § 254(a),

those activities are an integral and indispensable part of employees' principal activities." Upon further consideration of U.S. Steel's arguments that donning, doffing, showering, and laundering personal clothing aren't integral and indispensable activities, the court agreed with U.S. Steel that showering (excluding Coke plant employees) and laundering of personal clothing weren't compensable activities under 29 U.S.C. § 254(a), but found that U.S. Steel hadn't established that the donning and doffing of protective clothing isn't an integral and indispensable part of the employees' principal activities.

U.S. Steel now asks that the court certify an interlocutory appeal under 28 U.S.C. § 1292(b). The ruling sought to be appealed relates to the interaction of 29 U.S.C. § 203(o) and 29 U.S.C. § 254(a) and whether § 203(o) activities can be principal activities that begin and end a work day. U.S. Steel also asks the court to reconsider a portion of its October 15 ruling. The court addresses the requests separately.

I. Motion to Reconsider

Federal Rule of Civil Procedure 54(b) provides that a court may alter or amend an interlocutory order any time before entry of final judgment. *See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983) ("[E]very order short of a final decree is subject to reopening at the discretion of the district judge."). Unlike a motion to reconsider a final judgment, which must meet the requirements of Federal Rules of Civil Procedure 59 or 60, "a motion to

reconsider an interlocutory order may be entertained and granted as justice requires." *Akzo Coatings, Inc. v. Aigner Corp.*, 909 F. Supp. 1154, 1160 (N.D. Ind. 1995).

Reconsideration of an interlocutory order may be appropriate when the facts or law on which the decision was based change significantly after issuance of the order, or when the court has misunderstood a party, made a decision outside the adversarial issues presented by the parties, or made an error not of reasoning but of apprehension. *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990). "These grounds represent extraordinary circumstances, and the granting of a motion to reconsider is to be granted only in such extraordinary circumstances . . . Indeed, the court's orders are not mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *United States Securities and Exch. Comm'n v. National Presto Indus., Inc.*, No. 02-C-5027, 2004 WL 1093390, at *2 (N.D. Ill. Apr. 28, 2004). Motions to reconsider serve a limited function: "to correct manifest errors of law or fact or to present newly discovered evidence." *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1269 (7th Cir. 1996).

U.S. Steel seeks reconsideration of the court's determination that the company waived its collective bargaining argument relating to the plaintiffs' walking time claim because, U.S. Steel says, the company raised the argument in a timely and fair manner significantly before the filing of U.S. Steel's reply

brief and the plaintiffs had ample opportunity to respond to the argument. The court can't agree.

A review of U.S. Steel's summary judgment submissions shows that, contrary to U.S. Steel's assertion, the company's reliance on provisions of the CBA in support of its argument under 29 U.S.C. § 254(a) first appeared in the reply brief. *See* Deft. S. Judg. Reply, at 16-17. U.S. Steel claims it "expressly raised – and set forth in detail – the argument regarding deference to the parties' [CBA] with respect to walking time in its Motion for Leave to Supplement its Statement of Material Facts and Appendix of Record Evidence in Support of its Motion for Summary Judgment." While U.S. Steel's claim is true – the "Motion for Leave to Supplement" contains that argument – the argument isn't contained in either the "Supplement to Statement of Material Facts" or the "Supplement to Appendix" filed by U.S. Steel.

U.S. Steel's "Motion for Leave to Supplement" (docket # 106) was filed on September 17, 2008 and granted on September 23 (docket # 108); the company's "Supplement to Statement of Material Facts" and "Supplement to Appendix" became docket numbers 111 and 112, respectively, on September 29. The arguments U.S. Steel set forth in its "Motion for Leave to Supplement" were made in support of its request that it be allowed to supplement the summary judgment record. An opposing party might expect to respond to the "Motion for Leave to Supplement" by agreeing or objecting to U.S. Steel's request to file a supplement, but the "Supplement"

and "Appendix" documents don't contain any argument relating to consideration or application of provisions of the 2008 CBA to the company's argument under the Portal-to-Portal Act, so neither the opposing party nor the court would have been alerted that the "Motion for Leave to Supplement" was intended to be part of the company's summary judgment submission. The arguments U.S. Steel now relies on weren't made in support of the company's request for summary judgment until the reply brief, depriving the plaintiffs of an opportunity to respond. The company's motion to reconsider is denied.

II. Motion to Certify Interlocutory Appeal

U.S. Steel asks the court to certify the following question for appeal: "Under the FLSA, where it has been determined that the activities of donning, doffing, and washing are not to be included in hours of employment by operation of 29 U.S.C. § 203(o), can such activities, under any circumstances, start or end the continuous work day under 29 U.S.C. § 254(a) of the Portal-to-Portal Act?"

Interlocutory appeals are governed by 28 U.S.C. § 1292(b), which provides, in pertinent part, that

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an

> immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

Certification under § 1292(b) requires four statutory criteria be met: (1) there must be a question of *law*; (2) it must be *controlling*; (3) it must be *contestable*; and (4) its resolution must promise to *speed up* the litigation. *Ahrenholz v. Board of Trustees of the Univ. of Illinois*, 219 F.3d 674, 675 (7th Cir. 2000) (emphasis in original). "There is also a nonstatutory requirement: the petition must be filed in the district court within a *reasonable time* after the order sought to be appealed. Unless *all* these criteria are satisfied, the district court may not and should not certify its order to [the appellate court] for an immediate appeal under section 1292(b)." *Id.* "Certification is the exception and not the rule." *In re Brand Name Prescription Drugs Antitrust Litig.*, 878 F. Supp. 1078, 1081 (N.D. Ill. 1995).

(1) Is There A Question of Law?

The phrase "question of law" in § 1292(b) relates to a "question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine rather than to whether the party opposing summary judgment [has] raised a genuine issue of material fact." *Ahrenholz v. Board of Trustees*, 219 F.3d at 676. The framers of § 1292(b) intended the term "question of law" to refer to a "'pure' question of law rather than merely to an issue that might be free

from a factual contest. The idea was that if a case turned on a pure question of law, something the court of appeals could decide quickly and clearly without having to study the record, the court should be enabled to do so without having to wait till the end of the case." *Ahrenholz v. Board of Trustees*, 219 F.3d at 676-677; *see also McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004) (section 1292(b) appeals "were intended, and should be reserved, for situations in which the court of appeals can rule on a pure, controlling question of law without having to delve beyond the surface of the record in order to determine the facts.").

U.S. Steel presents a question of statutory interpretation relating to the interaction of 29 U.S.C. § 203(o) and 29 U.S.C. § 254(a): whether the activities of changing clothes and washing that are not included in "the hours for which an employee is employed" under Section 203(o) can, under any circumstance, start or end the continuous work day under Section 254(a). A fact-specific decision isn't necessary and the question can be decided without further study of the record, so the question presented qualifies as a "question of law" for purposes of § 1292(b).

(2) Is the Question of Law Controlling?

"A 'controlling question' can exist where resolution of the question will resolve the litigation in its entirety or where it will establish whether a particular claim exists." *DeKeyser v. Thyssenkrupp Waupaca*,

Inc., No. 08-C-488, 2009 WL 750278, at *2 (E.D. Wis. Mar. 20, 2009). In other words, resolution of a controlling question of law must affect the course of the litigation.

The plaintiffs and the defendant agree that this issue's resolution would establish whether the case would proceed to trial. Were U.S. Steel to prevail on appeal, no trial would be necessary and the litigation would be resolved in its entirety. Thus, the question of law is controlling.

(3) Is the Question of Law Contestable?

The third statutory criterion is whether the question of law is contestable, that is, whether "substantial grounds for a difference of opinion" on the issue exist. *City of Joliet v. Mid-City Nat'l Bank*, No. 05-C-6746, 2008 WL 4889038, at *2 (N.D. Ill. June 13, 2008). "[A] court faced with a motion for certification must analyze the strength of the arguments in opposition to the challenged ruling to decide whether the issue is truly one on which there is a substantial ground for dispute." *Williams v. Saxon Mortgage Co.*, No. 06-0799-WS-B, 2007 WL 4105126, at *2 (S.D. Ala. Nov. 15, 2007) (*quoting APCC Servs., Inc. v. AT&T Corp.*, 297 F. Supp. 2d 101, 107 (D.D.C. 2003)); *see also In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 212 F. Supp. 2d 903, 909-910 (S.D. Ind. 2002) (certification is appropriate where "other courts have adopted conflicting positions regarding the issue of law proposed for certification").

This court considered U.S. Steel's summary judgment arguments on this issue and found that it couldn't conclude "as a matter of law that the non-compensability of donning, doffing, and showering activities under 29 U.S.C. § 203(o) excludes consideration of whether, pursuant to 29 U.S.C. § 254(a), those activities are an integral and indispensable part of employees' principal activities at USS." Op. and Ord., at 28. Some courts have reached a similar conclusion. *See Andrako v. United States Steel Corp.*, 632 F. Supp. 2d 398, 413 (W.D. Pa. 2009) (court was "not convinced that § 203(o) changes the 'principal' nature of donning and doffing activities, or that 'principal' activities somehow become 'preliminary' or 'postliminary' under the Portal Act simply because they are rendered noncompensable by a collective-bargaining agreement in accordance with § 203(o)"); *Gatewood v. Koch Foods of Mississippi, LLC*, 569 F. Supp. 2d 687, 702 (S.D. Miss. 2008) ("Although the act of 'changing clothes' itself is barred based on § 203(o) . . . , the activities that occur after changing into sanitary gear and before changing out of sanitary gear are not impacted by the defense. If the jury determined that donning and doffing this gear was integral and indispensable, their commencement would trigger the 'continuous workday rule,' and might make the walking and waiting time at issue compensable."); *Johnson v. Koch Foods, Inc.*, No. 2:07-CV-51, 2009 WL 3817447, at *12 (E.D. Tenn. Nov. 13, 2009) ("if the donning, doffing, and washing excluded by § 203(o) are determined by the trier of fact to be integral and indispensable, those activities could

commence the workday"); and *Figas v. Horsehead Corp.*, No. 06-1344, 2008 WL 4170043, at *20 (W.D. Pa. Sept. 3, 2008) ("[T]he Court is convinced that activities rendered noncompensable under § 203(o) by a collective-bargaining agreement can nevertheless mark the beginning and the end of a continuous workday for purposes of the Portal Act, and that § 203(o) should be read to exclude only 'time spent in changing clothes or washing.'"). Other courts, as well as the Department of Labor, have concluded to the contrary, holding that activities covered by Section 203(o) – activities excluded from "hours worked" – can't be considered principal activities and don't start the workday. *See Hudson v. Butterball, LLC*, No. 08-5071-CV-SW-RED, 2009 WL 3486780, at *4 (W.D. Mo. Oct. 14, 2009) ("Because time Hudson spent sanitizing, donning, and doffing is excluded from hours worked under § 203(o), the walking time did not follow or precede a principal work activity, and therefore is not compensable."); *Sisk v. Sara Lee Corp.*, 590 F. Supp. 2d 1001, 1011 (W.D. Tenn. 2008) ("once an activity has been deemed a section 3(o) activity, it cannot be considered a principal activity"); Department of Labor Opinion Letter FLSA 2007-10, 2007 WL 2066454, at *1 (May 14, 2007) ("[A]ctivities covered by section 3(o) cannot be considered principal activities and do not start the workday.").

In deciding the issue of the interaction between 29 U.S.C. §§ 203(o) and 254(a), the court carefully considered, contrasted, and compared the cases just cited and the many reasons cited for those decisions.

Grounds exist for a difference of opinion on the issue and the arguments in opposition to the challenged ruling aren't insubstantial. *Accord Andrako v. United States Steel Corp.*, 632 F. Supp. 2d 398, 412 (W.D. Pa. 2009) ("This question – whether Section 203(o) renders otherwise principal activities simply non-compensable or both non-compensable and non-principal – is a difficult one and one that has divided the few authorities that have addressed it."). The question of law presented here is not settled by controlling authority and, as evidenced by the differing conclusions cited above, is contestable.

(4) Will Resolution of the Question of Law Speed Up the Litigation?

"This is not a difficult requirement to understand. It means that resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation." *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004).

The class certification issue still pends. According to U.S. Steel, without interlocutory appeal, the parties will be required to brief the certification issue, and if the class is certified, provide notice to potential class members, undertake additional discovery, and likely file further dispositive motions. Ultimately, a trial on the merits might be required. "In stark contrast, if the court of appeals were to reverse on the question of law on which U.S. Steel seeks certification,

the case would be over. Thus, there potentially is substantial saving of time of the district court and of expense to the litigants." Deft. Memo., at 12 n. 5.

"Interlocutory appeal is favored where reversal would substantially alter the course of the district court proceedings or relieve the parties of significant burdens. . . . Immediate resolution of this issue has the potential to materially advance this litigation because it will potentially save judicial resources and litigant expense." *West Tennessee Chapter of Associated Builders and Contractors, Inc. v. City of Memphis*, 138 F. Supp. 2d 1015, 1026 (W.D. Tenn. 2000). The fourth requirement is met.

(5) Is the Motion Timely?

While the statute doesn't contain a time limitation, U.S. Steel's filing of its motion eleven days after the issuance of the order sought to be appealed meets the non-statutory requirement that the request be filed within a "reasonable time."

III. Conclusion

The court grants in part and denies in part the defendants' motion [docket # 159]: the request for reconsideration is DENIED and the request for certification of interlocutory appeal is GRANTED.

The question the court believes meets the criteria for interlocutory review is the following: "Under the FLSA, where it has been determined that the

activities of donning, doffing, and washing are not to be included in hours of employment by operation of 29 U.S.C. § 203(o), can such activities, under any circumstances, start or end the continuous work day under 29 U.S.C. § 254(a)?"

SO ORDERED.

ENTERED: January 5, 2010

/s/ Robert L. Miller, Jr.
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CLIFTON SANDIFER, et al., Plaintiffs	)	
vs.	)	CAUSE NO.
UNITED STATES STEEL CORP.,	)	2:07-CV-443 RM
Defendant	)	

OPINION and ORDER

Plaintiffs, current or past employees at United States Steel's Gary Works, allege that they work or have worked numerous pre-shift, post-shift, and other hours in excess of forty hours per week for which they haven't been paid overtime compensation, that USS doesn't provide them with an itemized statement of the total hours worked each pay period, and that USS doesn't maintain proper records of hours worked by employees, all in violation of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* The plaintiffs allege in their complaint [filed December 21, 2007, docket # 1] that they are entitled to overtime compensation for a variety of activities performed on and off the job site. They bring their claims individually and as part of a collective action under 29 U.S.C. § 216(b) on behalf of other similarly situated individually

currently or formerly employed by USS.[1] The plaintiffs seek liquidated damages (or, alternatively, interest), overtime compensation, attorneys fees, and costs.

The case is before the court on USS's summary judgment motion, in which the company argues that various provisions of the parties' labor agreements and the Fair Labor Standards Act bar the plaintiffs' claims. A hearing was held on the summary judgment motion on June 1, 2009. Based on the parties' oral arguments and written submissions, the court grants in part and denies in part the defendant's motion.

I. BACKGROUND

Some 5,000 people are employed at USS's Gary Works plant where steel is produced and finished. Five hundred employees work in management or as nonunion clerical workers. The rest are union-workers represented by the United Steelworkers of America: production and maintenance workers in the Coke and Chemical Division, Iron Producing Division, Steel Producing North Division, Steel Producing South Division, and Operations Services Division are members of Local 1014; production and maintenance workers in the finishing operations (Hot Rolling

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[1] Magistrate Judge Cherry stayed briefing on the plaintiffs' motion to certify class [docket # 32] on March 28, 2008 [docket # 34] pending the court's ruling on the defendant's summary judgment motion.

Division, Sheet Products Division, and Tin Products Division) are members of Local 1066. The plaintiffs are current or former employees of USS and current or former members of the Steelworkers Union.

A. Collective Bargaining Agreements

The USS/USWA collective bargaining agreements (CBA) applicable to the issues before the court are the 2003 CBA, effective from May 20, 2003 to September 1, 2008, and the 2008 CBA, a four-year contract that became effective on September 9, 2008. Those CBAs contain the terms and conditions for the production and maintenance workers at all of USS's domestic steel producing facilities, including the Gary Works.

B. Daily Activities of Employees

Gary Works plant employees enter the facility through any of seven entrances located at various places across the length of the plant. Employees park their cars in company parking lots, walk to a gate entrance, enter the premises via a personal swipe card, and proceed to their assigned work location or to one of several locker rooms and then to their assigned work location.

USS employees have access to personal lockers and locker room facilities at the plant where they can store their belongings and change into and out of their work clothes. Coke Plant workers use lockers that are partitioned so employees' work and street

clothes can be stored separately. OSHA regulations require that items worn in the Coke Plant not be removed from the locker room area except in a closed container, so USS contracts for the removal and laundering of those garments. The locker rooms also include shower facilities. Employees holding positions in the Coke Plant are required to shower at the end of their shift and, under the CBAs, are afforded time to do so[2]; employees who aren't required to shower at the end of their shift may do so if they choose.

USS provides protective clothing and equipment (PPE) for all employees. Such items include flame-retardant jackets and pants ("greens"), safety glasses, a hard hat, protective footwear (steel-toed shoes with metatarsal guards), gloves, hearing protection, snoods, spats, leggings, and/or wristlets. Protective gloves and hearing devices generally aren't donned before the start of the shift, but are put on once the employee arrives at the work site. The specific items of PPE worn by an individual employee depends on the requirements of an employee's job assignment. Other specialized items, such as respirators, aluminized suits, chemical suits, and welders hoods, are

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[2] USS says the 2003 CBA and local agreements and practices at the Gary Works Plant permitted Coke Plant employees to leave their work stations fifteen to twenty minutes before the end of their shifts for wash-up time, provided that the requirements of the pushing schedule and other production needs had been met. Kolb Dec., ¶ 52 [Deft. App. 21]. The 2008 CBA Letter Agreement provides Coke Plant employees with twenty minutes of wash-up time prior to the end of their shift. Deft. App. 392.

kept and put on as needed at job locations. All of the PPE items just mentioned are purchased, maintained, and laundered by USS (or its vendors), are available for employees' use only at the plant, and may not be removed from the plant.

The parties agree that workers must arrive at the plant before the start of their shift so they can put on their PPE and arrive at their work stations by the time the shift officially begins. Paid shifts begin when the person arrives at the assigned work station to begin work, and paid shifts end "eight hours later or, if overtime is worked, when the employee actually stops working." [Deft. Stmt. of Material Facts, ¶ 24.] Time employees spend in pre- and post-shift donning, doffing, walking, showering (with the exception of Coke plant employees), and laundering personal clothing – time the plaintiffs say averages nine to ten hours per week – is unpaid. At issue is whether Gary Works employees should be compensated for those pre- and post-shift hours.[3]

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[3] The plaintiffs appear to claim in their Supplemental Citation [docket # 150] addressing the decision in *Andrako v. United States Steel*, 632 F. Supp. 2d 398 (W.D. Pa. 2009), that they have advanced a claim that they were required to attend pre- and post-shift safety briefings without compensation, but neither the complaint nor the summary judgment record contains any such claim. The plaintiffs state in their summary judgment response that "[s]upervisors require employees to be at safety meetings, or at their work station, ready to begin work at the time their shift begins with all of their PPE donned and secured." Stmt. of Genuine Issues of Fact, at 4; Resp., at 8. The

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II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The court must construe the evidence and all inferences that reasonably can be drawn from the evidence in the light most favorable to the non-moving party, here, the plaintiffs. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "Summary judgment for a defendant is appropriate when a plaintiff 'fails to make a sufficient showing to establish the existence of an element essential to [his or her] case on which [he or she] will bear the burden of proof at trial.'" *Johnson v. ExxonMobil Corp.*, 426 F.3d 887, 892 (7th Cir. 2005) (*quoting Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805-806 (1999)). Summary judgment is not appropriate when "the evidence presents a sufficient disagreement to require submission

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plaintiffs can't use their Supplemental Citation to amend their complaint or supplement the summary judgment record, *cf. Burks v. Wisconsin Dep't of Transp.*, 464 F.3d 744, 758 n.15 (7th Cir. 2006) (plaintiff's claim "could be disregarded because Ms. Burks did not plead such a claim, nor did she amend her complaint to include it"); *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996) ("A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment."), so the issue of attending pre- and post-shift safety meetings without compensation isn't properly before the court and won't be addressed.

to a jury." *Anderson v. Liberty Lobby,* 477 U.S. at 251-252. The proper inquiry, then, is "whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250. Summary judgment "is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events." *Springer v. Durflinger,* 518 F.3d 479, 484 (7th Cir. 2008) (internal quotation and citation omitted).

III. DISCUSSION

Enacted in 1938, the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.,* guarantees "compensation for all work or employment engaged in by employees covered by the Act." *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123,* 321 U.S. 590, 602 (1944). The FLSA requires employers to pay their employees "a wage for all of the 'work' that they do," *Spoerle v. Kraft Foods Global, Inc.,* 527 F. Supp. 2d 860, 862 (W.D. Wis. 2007) (*citing* 29 U.S.C. §§ 206, 207), and to pay them one and a half times their hourly wage for every hour that they work in excess of forty hours a week. 29 U.S.C. § 207(a)(1). The FLSA doesn't define "work," but that term has been broadly construed to include "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal v.*

Muscoda, 321 U.S. at 598; *see also* 29 C.F.R. § 790.6(a) & (b) (a "workday" is "roughly described as the period 'from whistle to whistle,'" which includes all time within "the period between the commencement and completion" of an employee's principal activities, regardless of whether employee engages in work throughout the entire period).

Certain provisions of the FLSA were amended in 1947 by the Portal-to-Portal Act, 29 U.S.C. §§ 251-262, which exempts employers from compensating employees for (1) time spent walking, riding, or traveling to and from the actual place of performance of the principal activity the employee is employed to perform, and (2) engaging in preliminary or postliminary activities if those actions occur either prior to the time the employee starts engaging in "principal activities" or after the employee stops engaging in "principal activities" on any particular workday. 29 U.S.C. § 254(a). A "principal activity" is "an integral and indispensable part of the principal activities for which covered workmen are employed." *Steiner v. Mitchell,* 350 U.S. 247, 256 (1956); *see also* 29 C.F.R. § 270.8(a) ("[I]n order for an activity to be a 'principal' activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job; rather, an employee may, for purposes of the Portal-to-Portal Act, be engaged in several 'principal' activities during the workday. The 'principal' activities referred to in the statute are activities which the employee is 'employed to perform.'" (footnote omitted)).

The FLSA was amended again in 1949 by the addition of Section 3(o), which provides that in determining the hours for which an employee is employed, "there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to a particular employee." 29 U.S.C. § 203(o).

USS maintains its employment practices don't violate the FLSA, and the company has moved for summary judgment on the claims of the plaintiffs' complaint. USS says the plaintiffs aren't entitled to the relief they seek because (I) the additional compensation sought is barred by language of the CBAs; (ii) overtime compensation for donning, doffing, and washing is barred by 29 U.S.C. § 203(o); (iii) the activities at issue are activities not compensable under 29 U.S.C. § 254(a); (iv) time spent donning, doffing, and washing is *de minimis* and therefore not compensable; and (v) plaintiffs didn't seek relief through the mandatory grievance and arbitration procedures of the CBA.

The plaintiffs dispute USS's summary judgment arguments. The plaintiffs contend the issue of compensation for pre- and post-shift activities isn't addressed by the express terms of the applicable CBA and genuine issues of material fact exist as to whether they are entitled to over-time compensation for reporting to work before their paid shift begins,

donning and doffing protective clothing and safety equipment in the company locker rooms before and after their paid shifts begin and end, traveling to their assigned work stations within the plant before their paid shifts begin, traveling from their assigned work stations to the company locker rooms after their paid shifts end, showering at the work site after their paid shifts end, and transporting and laundering contaminated clothing away from the work place while off duty.[4] The plaintiffs maintain they are entitled to be paid for time spent on those activities and USS has engaged in illegal pay practices by not compensating them for the many hours of pre- and post-shift work they perform on a daily and weekly basis.

A. 29 U.S.C. § 203(o)

USS says the plaintiffs are not entitled to the relief they seek based on 29 U.S.C. § 203(o) and the language of the applicable CBAs. Under Section 203(o), time spent by employees in pre- and post-shift donning and doffing of PPE and showering is excluded from the computation of hours worked if two conditions are met: first, the activities at issue

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[4] In May 2008, the plaintiffs sought to bring an additional claim for overtime compensation relating to "buddy relief," but they didn't file an amended complaint containing that claim as directed by Magistrate Judge Cherry in his June 19, 2008 Order [docket # 91]. Therefore, the plaintiffs' "buddy relief" claim is not properly before the court.

constitute "changing clothes" as that term is used in the statute, and, second, a bona fide collective bargaining agreement excludes, by its express terms or by a custom or practice under the agreement, time spent changing clothes and washing from compensable working time. *Kassa v. Kerry, Inc.*, 487 F. Supp. 2d 1063, 1065 (D. Minn. 2007). The burden is on USS to establish that the time spent on those activities should be excluded from plaintiffs' compensation. *Davis v. Charoen Pokphand (USA), Inc.*, 302 F. Supp. 2d 1314, 1320 (M.D. Ala. 2004); *cf. Roe-Midgett v. CC Servs., Inc.*, 512 F.3d 865, 869 (7th Cir. 2008) ("The burden is on CCS to establish that an employee falls within the FLSA's administrative exemption."); *Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365, 370 (7th Cir. 2005) ("It is the employer's burden to establish that an employee is exempt from the FLSA's overtime requirements."). USS maintains it can establish both elements.

1. Changing Clothes

(a) "Clothes"

USS contends the PPE worn by employees at the Gary Works plant constitutes "clothes" as that term is used in 29 U.S.C. § 203(o). USS relies on WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 428 (1986), which defines "clothes" as "clothing," which, in turn, is defined as "covering for the human body or garments in general: all the garments and accessories worn by a person at any one time." USS maintains

"[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Alabama Tissue Ctr. of the Univ. of Alabama Health Serv. Found., P.C. v. Sullivan,* 975 F.2d 373, 378 (7th Cir. 1992). USS says giving the word "clothes" its ordinary meaning finds support in decisions like *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 955-956 (11th Cir. 2007); *Kassa v. Kerry, Inc.*, 487 F. Supp. 2d 1063, 1066-1067 (D. Minn. 2007); and *Davis v. Charoen Pokphand (USA), Inc.*, 302 F. Supp. 2d 1314, 1321-1322 (M.D. Ala. 2004), and in the Department of Labor's construction of § 203(o) in the agency's June 6, 2002 Opinion Letter.[5] USS insists that even though courts don't all agree on the proper definition for the term "clothes" in this context, "the language of Section 203(o) [is] clear and unambiguous [and] a rational examination of the items at issue here reveals them to be what they are: 'clothes.'" Deft. Memo., at 12.

The plaintiffs urge the court to find that use of the phrase "changing clothes" in Section 203(o) "is most sensibly construed to refer to the act of exchanging one set of ordinary clothing for another, such as a

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[5] In Opinion Letter FLSA 2002-2, the Wage and Hour Division of the DOL interpreted "clothes" under 29 U.S.C. § 203(o) to include "items worn on the body for covering, protection, or sanitation, but not to include tools or other implements such as knives, scabbards, or meat hooks." 2002 WL 33941766, p. 3 (June 6, 2002).

uniform or work clothes," and thus doesn't include their donning and doffing of PPE. Resp., at 29. The plaintiffs maintain the items of PPE worn by Gary Works employees aren't "clothes" as that phrase was defined in 1957 when Section 203(o) was enacted, citing to WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 507 (1957), which defined "clothes" as "[c]overing for the human body; vestments; venture; a general term for whatever covering is worn, or is made to be worn, for decency or comfort." According to the plaintiffs, "[w]hile protective equipment may cover the human body in a generic sense, such equipment is not worn 'for decency or comfort,' but rather as a component of the gear and equipment the worker must use to safely perform the tasks required of him by his employer." Resp., at 27-28.

The plaintiffs rely on the decision in *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003), which viewed § 203(o) as an "exemption" to the FLSA that was to be construed narrowly against the employer. The *Alvarez* court viewed the specialized gear worn by employees of a meat slaughtering and processing plant – sanitary outer garments; hard hat; hair net; ear plugs; face shield or safety goggles; gloves; liquid-repelling sleeves; aprons; leggings; safety boots/shoes; weight-lifting type belts; chain-link (mesh) metal aprons, leggings, vests, sleeves, and gloves; plexiglass arm guards; Kevlar gloves; and puncture-resistant protective sleeves – as "different in kind from typical clothing" and held that "changing clothes means something different from donning required

specialized personal protective equipment" 339 F.3d at 905. The plaintiffs say their PPE isn't worn for "decency or comfort" or as substitute clothing.

Recognizing the continuing disagreement about the proper interpretation of "changing clothes" under § 203(o),[6] the court finds persuasive the reasoning of

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[6] *Compare Andrako v. United States Steel Corp.*, 632 F. Supp. 2d 398, 410 (W.D. Pa. 2009) (concluding that flame retardant jackets and pants, glasses, boots, snoods, and hard hats "unquestionably fall within . . . any common definition of the word 'clothes' "); *Davis v. Charoen Pokphand (USA), Inc.*, 302 F. Supp. 2d 1314, 1321 (M.D. Ala. 2004) (finding hairnet, earplugs, boots, a smock, an apron, cotton gloves, rubber gloves, cutting gloves, arm guards, and plastic sleeves qualified as clothes under § 203(o) in reliance on dictionary definition of "clothing" as "covering for the human body or garments in general"); *Figas v. Horsehead Corp.*, No. 06-1344, 2008 WL 4170043, at *11 (W.D. Pa. 2008) (rejecting plaintiffs' claim that "all protective gear is outside the category of 'clothes' referenced in § 203(o)" as "inconsistent with the plain language of the statutory provision and the legislative intent reflected therein"); and *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556 (E.D. Tex. 2001) (donning and doffing aprons, smocks, gloves, boots, hairnet, and earplugs not compensable), *with Spoerle v. Kraft Foods Global Inc.*, 527 F. Supp. 2d 860 (W.D. Wis. 2007) (concluding that "clothes" refers only to "something the employee would normally wear anyway" or a replacement for such clothing and not "safety and sanitation equipment" that's "uniquely job-related" and "under the employer's control"); *Gonzalez v. Farmington Foods, Inc.*, 296 F. Supp. 2d 912 (N.D. Ill. 2003) (donning and doffing of "sanitary and safety equipment," including a helmet, white smock, plastic apron, arm guard, belly guard, plastic arm sleeve, a variety of gloves, a hook, knife holder, a piece of steel to straighten the edge of a knife blade, and knives didn't constitute "changing clothes" under § 203(o)); and *Perez v. Mountaire Farms, Inc.*, No. AMD 06-121, 2008 WL 2389798 (D.

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Anderson v. Cagle's, Inc., 488 F.3d 945, 955-959 (11th Cir. 2007), and *Andrako v. United States Steel Corp.*, 632 F. Supp. 2d 398, 407-410 (W.D. Pa. 2009), that the term "clothes" as used – but not defined – in § 203(o) should be given its ordinary, contemporary, common meaning, that is, as "covering for the human body or garments in general," as defined in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 428 (1986)). *Anderson v. Cagle's*, 488 F.3d at 955; *Andrako v. USS*, 632 F. Supp. 2d at 409. Thus, a determination of whether an item of protective gear should be considered "clothes" under § 203(o) depends on the exact nature of the item and the circumstances under which it is used. "A cloth jumpsuit, for instance, is probably clothing even if worn by a car mechanic as protection from oil and grease; a space suit is probably not clothing, even though it is a kind of protective outfit." *Kassa v. Kerry, Inc.*, 487 F. Supp. 2d 1063, 1067 (D. Minn. 2007). Regardless of whether an item is labeled "'personal protective equipment' or something else, a hair net is still a hair net, pants are still pants, and a smock is still a smock. Whether the items that plaintiffs don and doff are 'clothes' under § 203(o) depends on what those items *are*, not on what they are called by the CBA, by [the] plant manager, or by anyone else." *Kassa v. Kerry*, 487

Md. June 10, 2008) (narrowly construing "clothes" as not including aprons, rain suits, cooler suits, gloves (rubber, chain, and wizard), arm guards or sleeves, goggles or safety glasses, boots, hair nets, beard nets, and bump caps).

F. Supp. 2d at 1066 (emphasis in original); *see also Bejil v. Ethicon, Inc.*, 269 F.3d 477, 480 n.3 (5th Cir. 2001) ("nonsensical" to define "clothes" so narrowly as to exclude protective garments (lab coat, hair cover, facial hair cover, shoe cover) worn at plant).

USS has submitted for the court's review the items of PPE the company provides for its employees. *See* Kolb Decl., Exh. 4. Unlike the speciality [sic] items at issue in *Alvarez v. IBP*, 339 F.3d at 898 n.2, or those in *Fox v. Tyson Foods, Inc.*, No. CV-99-BE-1612, 2002 WL 32987224, at *3 (N.D. Ala. Feb. 4, 2002) (which included plastic aprons, thin knit gloves, cotton liner gloves, rubber outer gloves, mesh or chain gloves, dust masks, plastic sleeve covers, and hard plastic arm guards), the cloth jacket and pants, fabric snoods, hoods, leggings, and wristlets, and boots here at issue easily fall within the ordinary definition of "clothes." *See Andrako v. USS*, 632 F. Supp. 2d at 410 (finding same items of USS protective gear to be "clothing": "by description, look, feel, purpose, fit, and basic common sense, the items at issue are 'clothes' within any reasonable meaning of Section 203(o)"); *Figas v. Horsehead Corp.*, No. 06-1344, 2008 WL 4170043, at *11 (W.D. Pa. 2008) (the term "clothes" held to include flame-retardant jacket, pants, and/or coveralls, hard hat, and work shoes: "the adjective 'protective' does not deprive 'clothes' of their fundamental character"). And even if the court were to assume that hard hats, safety glasses, and ear plugs aren't "clothes," *but see Reich v. IBP, Inc.*, 38 F.3d 1123, 1126 n.1 (10th Cir. 1994) (requiring employees

to put on safety glasses, earplugs, and a hard hat "is no different from having a baseball player show up in uniform, a businessperson with a suit and tie, or a judge with a robe"), the time expended by each employee donning and doffing those items is minimal, or de minimis, and thus not compensable under the FLSA. *See Kassa v. Kerry,* 487 F. Supp. 2d at 1067 n.1 ("Hair nets and beard nets are . . . purely functional and are not generally considered 'clothes' as that term is ordinarily used. But the precise classification of hair nets and beard nets is not important [because] donning and doffing those items alone is surely a *de minimis* activity.").

(b) "Changing"

The plaintiffs further rely on WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 448 (1957) for a definition of "changing" – "to alter by substituting something else for, or by giving up for something else . . . as, to change one's clothes, one's occupation, or one's intention; to change cars or trains, partners, sides, or parties" – and conclude that Gary Works employees don't "'change clothes' . . . when they insert ear plugs, or put on hard hats, safety glasses, steel-toed boots, snoods, hoods, leggings, wristlets, or a pair of work gloves, or don flame retardant protective jackets and pants over their street clothes because such acts do not involv[e] the substituting of clothing." Resp., at 28-29. The court can't agree. "Nothing in the statute's language suggests that its application turns on whether one must fully disrobe

or exchange one shirt, for example, for another," *Anderson v. Cagle's,* 488 F.3d at 956, and the term "changing" can't be read so narrowly as to exclude the actions of the plaintiffs in donning and doffing the PPE they wear each day. *See* WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 248 (1984) (defining "change" as: "To make different: alter; to give a totally different form or appearance to: transform). Even if each employee did nothing more than put the items of PPE over the clothing he or she wore to the plant, adding those items would satisfy the "change" requirement. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 373 (2002) (defining "change" as: "To make different: to make different in some particular but short of conversion into something else").

While the plaintiffs argue for a narrow construction of § 203(o), say the court should follow *Alvarez v. IBP,* 339 F.3d 894 (9th Cir. 2003), and reject *Anderson v. Cagle's,* 488 F.3d 945 (11th Cir. 2007), and claim the proper definition of "clothes" doesn't include protective clothing of any kind, they haven't applied their arguments to the specifics of this case. They haven't explained why the items of protective clothing they are required to wear aren't "clothes" or why their donning and doffing activities don't amount to "changing clothes," nor have they compared or contrasted their items of protective clothing with items at issue in other cases. The plaintiffs' legal conclusion that protective clothing doesn't qualify as clothing under § 203(o) doesn't provide "the specific substantiating facts require[d] under Rule 56 to

create a genuine issue of material fact." *Carter v. American Oil Co.*, 139 F.3d 1158, 1162 (7th Cir. 1998). The court concludes USS has satisfied the first element under 29 U.S.C. § 203(o).

2. Collective Bargaining Agreement/Custom or Practice

To prevail on its § 203(o) defense, USS must establish not only that the items at issue in this case are "clothes" – which it has done – but also that the applicable CBA contains express terms excluding compensation for changing clothes and washing or there is a "custom or practice" under the applicable CBA of not paying workers for those pre- and post-shift activities. The parties agree that Gary Works employees aren't now and have never been compensated for time spent donning and doffing protective gear and showering before their paid shifts begin or after the shifts end.[7]

USS maintains the terms of the parties' collective bargaining agreements have excluded compensation for changing clothes and showering since 1947 when the issue was first memorialized in the parties' Supplemental Agreement, which provides that employees

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[7] All references to non-payment for "washing" or "showering" time recognizes the exception for Coke Plant employees who, pursuant to CBA provisions and local agreements and practices, are afforded wash-up time before the end of their paid shifts.

won't be paid for "time spent in preparatory or closing activities on the employer's premises . . . for which compensation is not paid under present practices." Deft. App. 267-268. USS says the referenced "preparatory or closing activities" include the donning and doffing of work clothes and washing up, and the parties' re-adoption of the terms of the 1947 Supplemental Agreement in subsequent CBAs establishes that the parties intended a custom or practice of non-compensation to continue over the periods of those contracts, as well.

USS insists the 1947 Supplemental Agreement, which contains specific terms excluding compensation for these activities, has governed this issue since 1947. For example, USS says, the 1947 Supplemental Agreement was re-adopted in the 1999 CBA, which, in Appendix C, specifically affirmed that "understandings reflected in the prior Supplemental Agreement concerning so-called portal-to-portal claims are re-adopted" for the term of the agreement. Deft. App. 269-270. USS says the 1947 Supplemental Agreement was incorporated into the 2003 CBA because that CBA specifically required new or different practices or agreements to be in writing and no writing relating to these activities was signed during that time. Kolb Decl., ¶ 37. And, USS says, in 2008, the company and the Union agreed "that starting in 1947, every national collective bargaining agreement . . . negotiated by the parties has included an agreement that [USS] is not obligated to pay employees for preparatory or closing activities which occur outside

of their scheduled shift or away from their worksite (i.e., so-called 'portal-to-portal activities') [including] donning and doffing of protective clothing (including such items as flame-retardant jacket and pants, metatarsal boots, hard hats, safety glasses, ear plugs, and a snood or hood) and washing up." Deft. App. 392.

USS also says the issue of non-compensation for the activities at issue has arisen in local bargaining and grievances over the years, as evidenced by a 1983 grievance filed by Local 1014 at USS's Gary Works plant based on the following claim: "At the present time we pick our time cards up at the gate, get on a bus, go to washhouse, change clothes and then go to line up area. We don't get paid until we get lined up." The grievance requested that USS "[p]ay portal to portal from gates." Deft. App. 271. USS says the union's request was denied. Kolb Decl., ¶ 38. USS says the issue of washing or showering time has been addressed by the parties over the years, as well, as evidenced by grievances filed by the union in 1974, 1977, 1980, 1983, and 1993 on behalf of employees in various departments of the Gary Works plant requesting that they be paid for time spent washingup/showering at the end of their shifts. *See* Deft. App. 290-311. USS concludes that changing clothes and showering "are not now, and have never been, considered compensable time at any point at Gary Works." Kolb Decl., ¶ 37.[*]

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[*] Mr. Kolb notes that local practices in the Coke Plant providing employees with wash-up time were allowed to

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Plaintiffs respond that the terms of the 1947 Supplemental Agreement aren't found in the 2003 CBA and can't be inferred as being applicable to the 2003 contract because, according to plaintiff Clifton Sandifer, the 2003 CBA "declared that its express terms constituted the 'full and complete understanding' between the parties. Sandifer Decl., ¶ 26. Mr. Sandifer's statement contains no reference or citation to the portion of the CBA upon which he relies. *See Estate of Moreland v. Dieter,* 395 F.3d 747, 759 (7th Cir. 2005) ("We will not scour a record to locate evidence supporting a party's legal argument.").

Plaintiffs next claim that USS "essentially concedes" that no agreement regarding these issues existed from 2003 to 2008 because the 2003 CBA didn't incorporate the 1947 Supplemental Agreement. Resp., at 32. According to the plaintiffs, USS admitted that the 2003 CBA "specifically intended to terminate existing local agreements and practices and require that such agreements and practices be memorialized in writing in the future." Resp., at 31. The plaintiffs' claim in this regard finds no support in the cited section of USS's argument, *see* Deft. Memo., at 18[9], or in plain language of the applicable sections of

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continue under the 2003 CBA if the time provided didn't diminish productivity or interfere with the demands of the production schedule. Kolb Decl., ¶ 52.

[9] USS presented the following argument on this point: "In 2003, the [Union] and [USS] entered into the current [CBA], which, while not expressly referring to the 1947 Supplemental Agreement, made it clear that the decades-old custom and

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the 2003 CBA. Section 5.A.6 of the 2003 CBA requires that "all future Local Working Conditions" – that is, those arising from 2003 forward – "be reduced to writing." Deft. App. 89. USS says the custom or practice here at issue has existed since 1947, so in 2003 the custom or practice wasn't a "future" local working condition that was required to be in writing. The 2003 CBA also provides in Section 5.A.7 that "any Local Working Condition established prior to May 20, 2003 that would interfere with the attainment of the workplace restructuring objective" would be eliminated and those local working conditions unaffected by the workplace restructuring plan "will be preserved." The plaintiffs haven't alleged or argued that the local working condition of non-payment for changing clothes and showering was eliminated because it interfered with USS's Workplace Restructuring and Productivity Plan or that that local working condition wasn't preserved over the effective period of the contract.

Plaintiffs say, too, that it isn't enough that an employer has a custom or practice of not paying

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practice of not paying for preparatory and closing activities that occur outside of the paid shift would remain in effect. In fact, the parties to the 2003 [CBA] went even further and provided that *any* then existing local agreement or practice that could diminish productivity would be terminated and that any new local agreement, custom or practice to the contrary had to be in writing, signed and approved at the national level. No such written agreement has been signed by the parties." Deft. Memo., at 18.

for time spent on the activities here at issue: use of the phrase "a custom or practice under a bona fide collective-bargaining agreement" in Section 203(o) requires the custom or practice to have a relationship with or arise under the auspices of the CBA. The plaintiffs contend "[t]he practice need not have been memorialized within the text of the CBA, but the issue must at least have arisen as part of the CBA negotiation process, such that the CBA's failure to address the question can fairly be attributed to the union's decision to acquiesce to the employer's practice." Resp., at 34. Plaintiffs claim that no custom or practice can exist under the 2003 CBA as evidenced by plaintiff Clifton Sandifer's statement that "[t]he CBA, which governed compensation at the time this suit was filed, did not address compensation for the activities at issue in this case. Nor was the issue discussed during the negotiations leading to that contract." Sandifer Decl., ¶ 26. Mr. Sandifer, though, hasn't set forth any information about his personal knowledge of the 2003 contract negotiations. He reports that from June 2006 to September 2008 he was Chairman of the Civil Rights Committee and in that capacity became familiar with the union grievance process and some of the grievances filed against USS, but he hasn't stated that he had any involvement in the 2003 contracts talks, was a member of the union's bargaining committee in 2003, or personally participated in or even attended the 2003 negotiation sessions in any capacity. Mr. Sandifer's unsupported statement that "the issue" wasn't discussed during the 2003 contract negotiations, without more, is

insufficient to create a genuine issue of material fact as to whether a custom or practice exists under the 2003 CBA. *Cf. Morrow v. Wal-Mart Stores, Inc.*, 152 F.3d 559, 563 (7th Cir. 1998) (affirming summary judgment where affidavit claiming that management knew of offensive photographs in the workplace didn't include any specifics about who complained, to whom the complaints were made, the nature of the complaints, or how the affiant gained personal knowledge of the complaints); *Hadley v. County of DuPage,* 715 F.2d 1238, 1243 (7th Cir. 1983) ("Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter, rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted.").

Plaintiffs lastly argue that the five-year span of the 2003 CBA – from 2003 to 2008 – is too short a period of time to establish a custom or practice, claiming that "a custom or practice in the FLSA context may not be found when a history of discord exists, as it does here." Resp., at 36. The plaintiffs cite language from *Tennessee Coal v. Muscoda,* 321 U.S. at 602, that "[a] valid custom cannot be based on so turbulent and discordant a history; it requires something more than unilateral and arbitrary imposition of working conditions." They further claim that the "issue of compensation for clothes changing need not be 'threshed out' between the union and the employer – it is enough the employer was unilaterally refusing

to pay for the activity at the time the CBA was entered into." Resp., at 37. But plaintiffs have offered no explanation as to the applicability of that language to the facts of this case nor have they set forth any evidence demonstrating that the issue at hand wasn't "threshed out" between USS and the Union during contract negotiations and grievance procedures. *See Davis v. Carter*, 452 F.3d 686, 692 (7th Cir. 2006) (court is not required to "scour a record to locate evidence supporting a party's legal argument" nor "research and construct the parties' arguments."); *Roger Whitmore's Auto. Servs., Inc. v. Lake County, IL*, 424 F.3d 659, 664 n.2 (7th Cir. 2005) ("It is the parties' duty to package, present, and support their arguments.").

USS has submitted evidence it says demonstrates the parties' continuing agreement to non-compensation for the activities here at issue – language in the 1947 Supplemental Agreement; inclusion of that agreement in the 1999 and 2008 CBAs; language in the 2003 CBA preserving prior local working condition agreements (like the 1947 Supplemental Agreement) and requiring new local working condition agreements to be in writing (there were none); and a custom or practice of non-payment for these activities. The plaintiffs haven't challenged USS's evidence that the issue of non-compensation has been addressed and agreed to between the company and the union since 1947, nor have the plaintiffs presented evidence of their own demonstrating a history of what they refer to as "unilateral and arbitrary" imposition of

working conditions, i.e., non-compensation for pre- and post-shift activities of changing clothes and showering, that would negate the terms of the parties' written agreements or create a genuine issue as to whether a custom or practice of non-compensation has existed in connection with the parties' bona fide collective-bargaining agreements since 1947. USS has carried its burden under 29 U.S.C. § 203(o), and the company's summary judgment motion is granted with respect to plaintiffs' claim for compensation for time spent donning and doffing PPE and showering.

B. 29 U.S.C. § 254(a) – Portal-to-Portal Act

USS next claims the plaintiffs' claims are barred under the Portal-to-Portal Act, which exempts employers from paying employees for (1) "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities" the employee was hired to perform and (2) engaging in activities that are "preliminary to or postliminary to [the employee's] principal activity or activities" if those activities occur either prior to the commencement of or subsequent to ceasing of the principal activity or activities on any particular workday. 29 U.S.C. § 254(a). "Principal activity" isn't defined in the statute, but the term has been interpreted as including all activities that are an "integral and indispensable part of the principal activities" for which the employees are employed. *Steiner v. Mitchell*, 350 U.S. 247, 252-253 (1956). "To be 'integral and indispensable,' an activity must be necessary to the principal

work performed and done for the benefit of the employer." *Alvarez v. IBP,* 339 F.3d at 902-903. "In contrast to integral and indispensable activities, preliminary or postliminary activities are activities spent predominantly in the employees' own interests." *Jerzak v. City of South Bend,* 996 F. Supp. 840, 848 (N.D. Ind. 1998). "The test, therefore, to determine which activities are 'principal' and which are 'an integral and indispensable part' of such activities, is not whether the activities in question are uniquely related to the predominant activity of the business, but whether they are performed as part of the regular work of the employees in the ordinary course of business." *Dunlop v. City Elec., Inc.,* 527 F.2d 394, 400-401 (5th Cir. 1976); *see also* 29 C.F.R. § 790.7(b) ("No categorical list of 'preliminary' and 'postliminary' activities . . . can be made, since activities which under one set of circumstances may be 'preliminary' or 'postliminary' may under other conditions be 'principal' activities."). USS's arguments will be addressed separately.[10]

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[10] USS also argued that the plaintiffs' walking time is noncompensable pursuant to the terms of the applicable CBA, a fact the company says the court "should weigh – heavily" because the "Portal-to-Portal Act expressly requires consideration of the parties' collective bargaining agreements to determine whether employers must pay employees for preliminary and/or postliminary activities." Reply, at 16. This argument was raised for the first time in USS's reply brief, so the company's argument in this regard is waived. *See United States v. Williams,* 436 F.3d 767, 769 (7th Cir. 2006) ("the defendant has waived this argument because he presented it for the first time in his reply

(Continued on following page)

1. Interaction with 29 U.S.C. § 203(o)

USS's first argument is that donning and doffing PPE and showering can't be considered principal activities because those activities are non-compensable under 29 U.S.C. § 203(o). USS says changing clothes and showering aren't parts of employees' measured working time, so the activities don't start or end the workday and can't be considered principal activities. Thus, USS says, walking to and from the locker rooms doesn't occur after the beginning of the first principal activity of the day or before the end of the last principal activity, rendering that walking time non-compensable under the Portal-to-Portal Act. USS says its position is supported by the Department of Labor's opinion that

> In promulgating [§ 203(o)] Congress plainly excluded activities covered by section [203(o)] from time that would otherwise be 'hours worked.' Accordingly, activities covered by section [203(o)] cannot be considered principal activities and do not start the workday. Walking time after a [§ 203(o)] activity is therefore not compensable unless it is preceded by a principal activity.

DOL Opinion Letter FLSA 2007-10, 2007 WL 2066454, at *1 (May 14, 2007).

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brief"); *Hart v. Transit Mgmt. of Racine, Inc.*, 426 F.3d 863, 867 (7th Cir. 2005) ("Arguments that first appear in a reply brief are deemed waived.").

Courts are to afford consideration to agency opinion letters interpreting the statutory provisions within the agency's area of expertise, *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("[T]he rulings, interpretations and opinions of the [DOL] under [the FLSA], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment as to which courts and litigants may properly resort for guidance."); *CenTra, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 578 F.3d 592, 601 (7th Cir. 2009) ("Opinion letters are not entitled to *Chevron* deference, or even the deference we accord an agency's interpretation of its own ambiguous regulation, . . . but opinion letters are 'entitled to respect . . . to the extent that [they] have the power to persuade.'" (*quoting Christensen v. Harris County*, 529 U.S. 576, 587 (2000)), but, in this instance, the DOL's 2007 FLSA Opinion Letter provides little guidance on the reason(s) for the agency's conclusion on this issue. The court finds more persuasive the conclusion of the *Figas* court that "the *character* of donning and doffing activities is not dependent upon whether such activities are excluded pursuant to a collective bargaining agreement." *Figas v. Horsehead Corp.*, No. 06-1344, 2008 WL 4170043, at *20 (W.D. Pa. Sept. 3, 2008) (emphasis in original). "Section 203(o) relates to the *compensability* of time spent donning, doffing, and washing in the collective bargaining process. It does not render such time any more or less integral or indispensable to an employee's job." *Andrako v. USS*, 632 F. Supp. 2d at 413 (emphasis in

original). Accepting USS's argument and the conclusion of the Opinion Letter on this issue would necessarily "expand § 203(o)'s exclusion beyond donning, doffing and washing time to include post-donning and pre-doffing travel time, which is not mentioned therein." *Figas v. Horsehead Corp.*, 2008 WL 4170043, at *20. The court can't conclude as a matter of law that the non-compensability of donning, doffing, and showering activities under 29 U.S.C. § 203(o) excludes consideration of whether, pursuant to 29 U.S.C. § 254(a), those activities are an integral and indispensable part of employees' principal activities at USS. *Contra Sisk v. Sara Lee Corp.*, 590 F. Supp. 2d 1001, 1011 (W.D. Tenn. 2008) (concluding that "once an activity has been deemed a section [203(o)] activity, it cannot be considered a principal activity. This finding is in accordance with the 2007 DOL opinion letter, which the court has already determined worthy of deference, stating that a section [203(o)] activity is not a principal activity. . . . Therefore, to avoid the preclusive effect of the combination of section [203(o)] and the continuous workday rule, plaintiffs must show that their claimed activities are themselves either principal activities or are integral or indispensable to a principal activity.").

2. Integral and Indispensable

USS next asserts that the activities here at issue – donning and doffing, showering, and the laundering of employees' personal clothing – aren't "integral and indispensable" parts of the employees' principal

activities because those activities aren't necessary to employees' performance of their principal activities and aren't undertaken for the sole benefit of the company. The company's arguments relating to each activity will be addressed separately.

(a) Donning and Doffing of PPE

USS says that based on differing job assignments within the plant, not all employees are required to wear PPE – for example, as a Bander in the Hot Roll finishing department, plaintiff Alvin Mitchell wasn't required to wear greens, although he chose to do so. *See* Burton Decl., ¶ 3 [App. 339-340]. USS says, too, that wearing greens isn't necessary to the performance of the principal activities of certain jobs – for example, wearing greens isn't necessary for plaintiffs Dora Anderson and Kenny Williams to monitor temperatures and opacity gauges in their positions as Heaters in the Coke Plant, even though, USS notes, wearing greens was required for that position. Deft. Memo., at 25. USS asserts that even though wearing PPE at Gary Works unquestionably advances the company's core value of maintaining a safe work environment, "that interest is not for the exclusive benefit of the employer. Wearing greens clearly serves the mutual interest of the employer and the employee to avoid accidents and to work in the safest environment possible." Deft. Memo., at 26. USS maintains that donning and doffing of generic work clothes isn't an integral and indispensable part of principal activities at the plant because the donning and doffing of

PPE isn't necessary to the principal work performed by employees and isn't done for the sole benefit of the company. Donning and doffing, USS concludes, are preliminary and postliminary activities and, therefore, walking from the locker rooms to the employees' place of principal activity and back to the locker room after employees cease their principal activities is not compensable under the Portal-to-Portal Act.

Plaintiffs respond that donning and doffing PPE is integral and indispensable to the principal work activities at the plant: they insist they wear PPE because doing so is required by USS and OSHA and the use of PPE "prevents workplace injuries, which would severely impeded [sic] USS's business." Resp., at 44. The plaintiffs, though, haven't challenged USS's claim that some job assignments don't require employees to wear PPE, that wearing PPE isn't necessary for some employees to perform their jobs, or that the wearing of PPE serves the mutual safety interests of the company and the employees. Plaintiffs cite Coke Plant regulations relating to the wearing of flame-retardant clothing, *see* Resp., at 38-39 (citing to "29 CFR § 1910.1029 et al."), but haven't referenced specific USS rules or OHSA regulations that address the PPE they are required to wear. The plaintiffs cite generally to USS handbooks and safety manuals – for example, plaintiffs set forth the booklet explaining USS's Personal Protective Equipment Program, which provides that management personnel must assure that "*affected employees* use PPE," at p. 1 (emphasis in original), "*[a]ffected employees* shall wear the

required PPE for the area(s) where they are working," at p. 2 (emphasis in original), and "[a]fter training, *affected employees* will be able to independently determine when and what PPE is necessary in their normal workplace," at 3 (emphasis in original), *see* Walton Decl., Exh. B – but they haven't pointed to specific provisions of those materials that designate the PPE they are required to wear or explained how the PPE they wear is necessary to their performance of their job tasks.

The changing of clothes is integral and indispensable to an employee's principal activities if the donning is "necessary to the principal work performed and done for the benefit of the employer." *Alvarez v. IBP*, 339 F.3d at 903; *see also Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) ("Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case."); *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 910 (9th Cir. 2004) (changing clothes may be considered integral and indispensable "where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work"). The parties' evidence establishes that Coke Plant employees are required to wear PPE, and USS has set forth evidence that at least one plaintiff not working in the Coke Plant isn't required to wear PPE and the requirement to wear PPE isn't vital to the performance of at least one job assignment in the Coke Plant. But viewing that evidence in the light most favorable to

the plaintiffs as the court is required to do at this stage of the proceedings, the court concludes that USS hasn't established that the donning and doffing of PPE isn't an integral and indispensable part of the principal activities at USS. The court agrees with USS that the safety advantages associated with the wearing of PPE is of mutual benefit to the company and the plaintiffs; however, a reasonable fact-finder could conclude that the donning and doffing of PPE is necessary to the principal work performed by the plaintiffs. The company's request for summary judgment on this issue is denied.

(b) Showering

USS maintains the company has no requirement that employees working in areas other than the Coke Plant must shower at the end of their shifts and those who do shower before leaving the plant do so for their own convenience. USS says the applicable CBAs contain a recognition of the shower requirement for Coke Plant employees and the parties' agreement that those employees are to be afforded time to shower before the end of their paid shifts, but "[e]xcept for employees at the Coke Plant, there is no requirement whatsoever that any employee wash up or shower after the end of his shift. While U.S. Steel does provide and maintain numerous wash houses and locker rooms throughout the plant, whether an employee elects to wash up or shower is the employee's decision and for his own convenience." Kolb Dec., ¶ 48.

USS sets forth additional statements by supervisory employees relating to showering requirements at the plant:

– Declaration of Donald G. Ramsey, Jr. that there is no showering requirement for people holding position of Stock Unloader on Hi-Line, including plaintiff Nicole Andrews; Mr. Ramsey reports he's been working at USS since 1998 and is currently a Process Coordinator on the Hi-Line. *See* Deft. App. 370-371.

– Declaration of James Lash, who has worked at USS since 1998, is currently Steel Coordinator on No. 1 BOP, and says there's no requirement that Pit Utility employees, like plaintiff Bernard Jenkins, shower at the end of their shifts. *See* Deft. App. 349-353.

– Declaration of Nicholas Furdeck, who became employed at USS in 1998, is the current Pit Coordinator and Interim Area Manager for the Q-BOP, and says that USS has no requirement for employees at the Q-BOP, like plaintiff Bernard Jenkins, to shower at the end of their shifts. *See* Deft. App. 341-347.

– Declaration of Michael Burton, who has worked at USS since 1999 and was Shift Manager at EGL until December 2007 when he became Shift Manager at South Sheet Metal Warehouse, and says there's no requirement that employees at EGL, like plaintiff Alvin Mitchell, shower at the end of their shifts. *See* Deft. App. 339-340.

– Declaration of Gregory Olson that USS has no requirement that employees working as

Banders and Diesel Burners, like plaintiff Alvin Mitchell, shower before they leave the plant; Mr. Olson reports he began working at USS in 2000 and is currently Shift Manager in Hot Roll Finishing. *See* Deft. App. 355-358.

– Declaration of David Best, who began employment at USS in 1994, is currently Hot Strip Mill Coordinator, and states that there's no requirement that employees, like plaintiff Clifton Sandifer, who work in the Hot Strip Mill shower at the end of their shifts. *See* Deft. App. 334-338.

USS concludes that because showering isn't required and inures to the benefit of the employees, that activity isn't an integral and indispensable part of employees' principal activities and is non-compensable time under the Portal-to-Portal Act.

While plaintiffs claim that showering is "mandatory" under USS policies and OHSA requirements and the requirement for them to shower before they leave the plant benefits the company, they have produced no evidence to support their claim nor have they challenged the statements of USS supervisory personnel that no showering requirement exists outside the Coke Plant. Plaintiffs' conclusory statements, without more, are insufficient to create a genuine issue of material fact relating to the issue of showering.

USS has presented evidence sufficient to establish that, with the exception of Coke Plant employees, showering isn't otherwise required by the company and shower facilities are located in the locker rooms

at the plant for the convenience of the employees. The court concludes that showering constitutes a postliminary activity under 29 U.S.C. § 254 for which USS isn't required to compensate its employees. USS is entitled to summary judgment on this issue.

(c) Laundering Personal Clothing

USS also asserts that the plaintiffs aren't entitled to be paid for time spent transporting and laundering the personal clothing they wear under their PPE because that time doesn't qualify as "work" and so is not compensable under the FLSA. USS says the plaintiffs' washing of their personal clothing isn't "necessarily and primarily for the benefit" of the company, USS derives no benefit from employees wearing clean personal clothing under their PPE, and USS has no requirement that employees' personal clothing be laundered or cleaned.

Because the term "washing" as used in Section 203(o) can't be seen as including laundering clothes, *see Burks v. Equity Group-Eufaula Div., LLC,* 571 F. Supp. 2d 1235, 1243-1244 (M.D. Ala. 2008) (noting that "the vast majority of cases that have specifically discussed 'washing' in the context of § 203(o) have done so only in the context of washing one's body" and "the legislative history of 203(o) indicates that the term 'washing' was intended to be limited to cleaning the person"); *Saunders v. John Morrel & Co.,* No. C88-4143, 1991 WL 529542, at *4 (N.D. Iowa Dec. 24, 1991) (same), USS is entitled to summary judgment

only if the plaintiffs' laundering activity can be excluded from coverage as a "preliminary or postliminary" activity under 29 U.S.C. § 254(a)(2). Thus, the court must determine whether plaintiffs' laundering of their personal items of clothing is (I) required by USS, (ii) necessary for the plaintiffs to perform their duties, and (iii) primarily for the benefit of USS. *Bonilla v. Baker Concrete Const., Inc.*, 487 F.3d 1340, 1344 (11th Cir. 2007); *Jerzak v. City of South Bend*, 996 F. Supp. 840, 848 (N.D. Ind. 1998).

The plaintiffs claim that their laundering of personal work clothes is compensable under the FLSA in reliance on *Bull v. United States*, 68 Fed. Cl. 212 (Fed. Cl. 2005), where the court held that off-duty laundering of canine training towels was of benefit to the employer and integral and indispensable to the canine handlers' job duties. Plaintiffs say USS dictates the type of clothing they must wear under their PPE and the methods they must use to launder that clothing; they say, too, that OSHA regulations, *e.g.* 29 C.F.R. § 1910.1018, require USS to provide for the cleaning of chemically contaminated clothing, "including shoes and underwear."[11] The plaintiffs maintain

[11] The plaintiffs cite generally to 29 C.F.R. § 1910.1018, which relates to "occupational exposures to inorganic arsenic" and outlines the obligations of employers in maintaining workplaces where such exposure might occur. The plaintiffs haven't specified any applicable section(s), but upon examination of the regulation, the court found the following references to the care of clothing for employees working in affected areas: employers are required to provide employees working in regulated areas

(Continued on following page)

their clothing is regularly contaminated with chemicals so USS benefits directly by requiring them to personally launder that clothing.

Plaintiffs' laundering claim relates to the personal items of clothing they wear each day.[12] The plaintiffs first say that USS dictates the clothing they must wear under their PPE, as well as the manner in which they must launder that clothing, and that transporting and laundering of those personal items of clothing "is done under the express direction of

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with protective work clothing and equipment; launder that protective clothing "at least weekly," repair or replace protective clothing as needed; assure that contaminated protective clothing is placed in a closed container in the changing rooms; inform any person who cleans or launders the protective clothing of the harmful effects of exposure to inorganic arsenic; prohibit the removal of inorganic arsenic from protective clothing by shaking or blowing; provide changing rooms with separate storage facilities for street clothes and protective clothing; and provide facilities for employees to vacuum their protective clothing and shoes before entering other areas of the workplace. *See* § 1910.1018(j), (m). 29 C.F.R. § 1910.1018 contains no requirement that an employer affected by this section provide laundering services for employees' personal clothing or reimburse employees for laundering their personal clothing.

[12] While the plaintiffs say USS provides employees with instructions on how to clean the flame retardant PPE and claim the company "required employees to launder their contaminated PPE in a certain manner," Stmt. of Genuine Issues, ¶ 8, the record establishes that USS supplies, maintains, and launders the flame retardant PPE worn by all employees. The plaintiffs have presented no evidence to support a finding that they are or were required to launder the flame retardant PPE supplied by the company.

USS," citing to unidentified sections of Exhibits 1-37. But unlike the situation in *Bull v. United States* where the evidence – specific portions of a handbook and a written memo – established that the canine training towels were required to be properly cleaned "after each use," 68 Fed. Cl. at 238, the plaintiffs' conclusory statements in Exhibits 1-37, without citation to any evidence that would support their claims, that they are "required" by USS to transport and launder their personal clothing, are insufficient to establish that USS requires its employees to launder their personal clothing. *See Ammons v. Aramark Uniform Servs., Inc.*, 368 F.3d 809, 817-818 (7th Cir. 2004) ("Citations to an entire transcript of a deposition or to a lengthy exhibit are not specific and are, accordingly, inappropriate. A court should not be expected to review a lengthy record for facts that a party could have easily identified with greater particularity."). The plaintiffs have provided no support for their conclusory statement that USS "directly benefits by requiring plaintiffs to take home and launder" their personal clothing, and they haven't alleged or argued that the transporting and laundering of their personal clothing is necessary for them to perform their duties.

USS provides employees with PPE, flame retardant apparel that the company launders and maintains. The company's Gary Works "Personal Protective Equipment Program" manual states that personal clothing worn beneath the PPE "should be 100% cotton" and directs that no synthetic material clothing, e.g.,

nylon, dacron, rayon, polyester, etc., be worn under the PPE because such material will "burn at lower temperatures, melt and stick to the skin." The "General Safety and Plant Conduct" manual instructs that work clothing shouldn't be laundered or washed "in flammable liquids, such as gasoline, kerosene, or similar fluids, as the cloth may retain a part of the solution and become highly flammable," and further advises that flame-retardant clothing "should be cleaned by washing, using normal wash, rinse and drying cycles at normal temperatures, and using a normal household detergent as the cleansing agent, [and] to avoid impairing the flame-resistant properties, such clothing should never be boiled or steam cleaned, and solvents or bleaches should never be used."

While employees at Gary Works are prohibited from wearing items of personal clothing that would "melt and stick to the skin" and are provided with information about how to safely launder their personal work clothes and any flame-retardant clothing they might choose to wear under the company-provided PPE, neither that prohibition nor the accompanying safety instructions transform the transporting and laundering of plaintiffs' personal clothing into a requirement of USS that is necessary for the plaintiffs to perform their duties or that is primarily for the benefit of USS. USS is entitled to summary judgment on the plaintiffs' laundering claim.

C. Time Expended is De Minimis

USS maintains the time spent by the plaintiffs donning and doffing PPE and walking to and from the job site is *de minimis* and not compensable under the FLSA. "Because defendant seeks to rely on an exception to the rule, it is the defendant's burden to prove that the exception applies." *Spoerle v. Kraft Foods Global, Inc.*, 527 F. Supp. 2d 860, 868 (W.D. Wis. 2007).

"The *de minimis* doctrine permits employers to disregard, for purposes of the FLSA, otherwise compensable work '[w]hen the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.'" *Singh v. City of New York*, 524 F.3d 361, 370-371 (2d Cir. 2008) (*quoting Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946)). Determination of whether the *de minimis* exception is applicable requires the court to examine four factors. *Hoyt v. Ellsworth Co-op. Creamery*, 579 F. Supp. 2d 1132, 1138 (W.D. Wis. 2008). The first factor is "the amount of daily time spent on the additional work;" the second is "the practical administrative difficulty of recording the additional time;" the third is "the aggregate amount of compensable time;" and the final factor is "the regularity of the additional work." "Although many courts have found daily periods of approximately 10 minutes to be *de minimis*, no rigid rule using mathematical certainty should be applied.

Instead common sense must be applied to the facts of each case." *Hoyt v. Ellsworth Creamery,* 579 F. Supp. 2d at 1138; *see also* 29 C.F.R. § 785.47 ("In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are *de minimis*. . . . This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.").

With respect to the amount of daily time expended, USS says donning the required PPE takes approximately 2 minutes, 40 seconds, as demonstrated in its video presentation submitted as Exhibit 1 to Raul Arana's Declaration [Deft. App. 323-333]. USS says while the walking distances from locker rooms to work locations "vary widely," estimates are between 1 minute, 38 seconds and 8 minutes. Deft. Memo., at 30. USS notes, too, that walking times are often reduced when employees are allowed to walk back to the locker rooms during their paid shifts. Doffing work clothes is alleged to take even less time than putting them on. Deft. Memo., at 30.

USS claims difficulty would arise under the second factor if the company had to record the additional time. USS contends that "[t]he time employees spend engaging in all of these pre- and post-shift activities cannot be administratively tracked. Employees are paid by shift, and customs and practices are prevalent throughout the plant pursuant to which employees are permitted, when the production or work schedule permits, to leave the work station early such that some doffing, walking, and washing will occur prior to the end of their paid shifts." Deft. Memo., at 30. USS has set forth affidavit statements that the time spent on these pre- and post-shift activities "varied by day and by employee. This is a personality driven thing. Some guys like to get to work early and read the paper. Some guys like to walk slow and chat with friends. It just varies." Lash Decl., ¶ 7 [Deft. App. 351].

USS maintains the aggregate amount of time expended is *de minimis*. According to the company, "[t]he variations among employees and units, and generally the small amounts of time expended pre and post shift, make each of these activities *de minimis* and, thus, non-compensable." Deft. Memo., at 30-31. And while USS didn't address the last factor, the additional time expended on donning, doffing, and walking is clearly "regular."

The plaintiffs argue in response that the *de minimis* rule "applies to the aggregate amount of time for which an employee seeks compensation, not separately to each discrete activity." Resp., at 48.

According to the plaintiffs, donning, doffing, and walking are all principal activities covered by the FLSA, so the measurement of time must be in the aggregate for purposes of the *de minimis* doctrine – "work cannot be parsed into discrete activities for measurement." Resp., at 48. Plaintiffs say their position is supported by the DOL's Wage and Hour Advisory Memorandum No. 2006-2, dated May 31, 2006, which interprets the decision in *IBP, Inc. v. Alvarez,* 546 U.S. 21 (2005), as "clearly stand[ing] for the proposition that where the aggregate time spent donning, walking, waiting, and doffing exceeds the *de minimis* standard, it is compensable. Any other conclusion would be inconsistent with the continuous workday rule." Pltf. Exh. 39, at 4. Plaintiffs have also offered suggestions of ways USS might better measure the time spent by employees on these activities so employees could be compensated on a weekly basis for the time. *See* Resp., at 50.

The parties seem to agree that the time spent on these activities varies from person to person and from activity to activity, but they offer widely differing estimates as to the amount of time required to complete the activities and dispute the feasibility of measuring that time for purposes of determining the amount of compensation that might be required. Questions of fact preclude summary judgment on this issue.

D. Mandatory CBA Grievance and Arbitration Procedures

USS lastly moves for summary judgment on the plaintiffs' claims because, the company says, all disputes arising under the CBA must be resolved through the procedures set forth in the CBA. USS says the "Adjustment of Grievances" section of the 2003 CBA provides a specific three-step grievance procedure that must be employed to settle "any differences . . . between [USS] and the Union as to the interpretation or application of, or compliance with, the provisions of this or any other Agreement between [USS] and the Union." Deft. App. 111-131.

This same argument was considered and rejected earlier this year by the court in *Andrako v. USS*, 632 F. Supp. 2d at 414, and that court's conclusion is equally applicable here: "Plaintiffs' claim for compensation for walking time does not rest on an interpretation of the underlying collective bargaining agreement. Rather, plaintiffs argue that regardless of what the collective bargaining agreement provides, the FLSA entitles them to compensation for post-donning and pre-doffing walking time as a matter of law. This is a question of statutory, not contractual, interpretation." USS's request for summary judgment based on the grievance and arbitration procedures of the applicable CBA is denied.

IV. Conclusion

Based on the foregoing, the court GRANTS IN PART and DENIES IN PART the defendant's motion for summary judgment [docket # 82] in the following particulars:

> (a) USS's request for judgment pursuant to 29 U.S.C. § 203(o) with respect to plaintiffs' claim for compensation for donning and doffing PPE and showering is GRANTED;
>
> (b) USS's request for judgment pursuant to 29 U.S.C. § 254(a) is
>
> > (1) GRANTED with respect to plaintiffs' claims related to showering and laundering, and
> >
> > (2) DENIED with respect to plaintiffs' claim related to walking time;
>
> (c) USS's request for judgment based on the *de minimis* doctrine is DENIED; and
>
> (d) USS's request for judgment pursuant to the grievance and arbitration procedures of the applicable CBA is DENIED.

SO ORDERED.

ENTERED: October 15, 2009

/s/ Robert L. Miller, Jr.
Chief Judge
United States District Court

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 11, 2012

Before

RICHARD A. POSNER, *Circuit Judge*

JOEL M. FLAUM, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

Nos. 10-1821, 10-1866

CLIFTON SANDIFER, *et al.*,

Plaintiffs-Appellees/ Cross-Appellants,

v.

UNITED STATES STEEL CORPORATION,

Defendant-Appellant/ Cross-Appellee.

Appeals from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 2:07-cv-00443-RLM-PRC

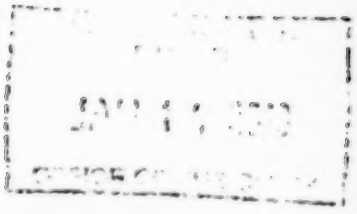
Robert L. Miller, Jr., *Judge*.

ORDER

On May 22, 2012, plaintiffs-appellees/cross-appellants filed a petition for rehearing *en banc*. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

OPPOSITION BRIEF

RECORD
AND
BRIEFS



No. 12-417

IN THE

Supreme Court of the United States

CLIFTON SANDIFER ET AL.,
Petitioners,

v.

UNITED STATES STEEL CORP.,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The time for which a covered employee is "employed" for purposes of the Fair Labor Standards Act ("FLSA") generally begins when the worker first engages in "a principal activity or activities which such employee is employed to perform." 29 U.S.C. § 254(a). However, § 203(o) of the FLSA allows an employer and a union to agree that time spent "changing clothes" will not be part of "the hours for which an employee is employed." Petitioners' union has agreed with Respondent through collective bargaining agreements spanning 65 years that time Petitioners spend changing into protective clothing—such as flame-retardant pants and jackets, work gloves, work boots, and protective hoods—is not part of the compensable work day. The questions presented are:

(1) Does the protective work clothing at issue in this case constitute "clothes" within the meaning of § 203(o), such that Petitioners' changing time is excluded from the hours for which they are employed?

(2) If time spent changing into protective clothing is properly excluded from "the hours for which [Petitioners are] employed" under § 203(o) may such changing nonetheless constitute "a principal activity ... which such employee is employed to perform" that triggers the start of the work day under the FLSA?

(3) If an employee engages in an activity that involves only a *de minimis* amount of time, such as donning a hard hat, safety goggles, or ear plugs, is that activity a principal activity that triggers the start of the compensable work day under the FLSA?

CORPORATE DISCLOSURE STATEMENT

Respondent United States Steel Corporation ("U. S. Steel") is a publicly held company. It has no parent company, and there is no publicly held company owning 10% or more of U. S. Steel's stock.

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STATEMENT OF THE CASE

This petition arises out of a putative collective action brought by Petitioners under the FLSA, 29 U.S.C. § 216(b).[1] Petitioners alleged that they were entitled to overtime compensation for time spent donning and doffing protective clothing and traveling to and from their assigned workstations. These claims implicate several interrelated provisions of the FLSA.

1. Congress enacted the FLSA in 1938 to "protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas Best Freight System, Inc.*, 450 U.S. 728, 739 (1981). The two core provisions of the Act—the minimum wage provision and the overtime provision—require that employees receive a minimum hourly wage for each hour that they are "employ[ed]" as well as a premium wage (one and one-half times the regular rate of pay) for each hour they are "employ[ed]" beyond 40 in one work week. 29 U.S.C. §§ 206(a), 207(a). The FLSA defines the term "employ" as "to suffer or permit to work." 29 U.S.C. § 203(g). The Act does not, however, define the term "work."

Early on, this Court construed the term "work" broadly. Citing the "remedial" purpose of the Act, it held that the term included all "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily

---

[1] The district court ruled on U. S. Steel's motion for summary judgment and certified that decision for an interlocutory appeal before determining whether the case could properly proceed as a collective action. Pet.App.2a, 20a & n.1.

and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597-98 (1944). The Court later added that "work" also included "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946).

Recognizing that through such judicial expansion of the term "work" courts could in effect overrule agreements made between unions and employers and create massive and retroactive liabilities, Congress moved quickly to cut back on that definition by enacting two overlapping modifications to the FLSA.

First, in the Portal-to-Portal Act of 1947, Congress explained that the Court's expansive definition of "work" "disregard[ed] long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities." 29 U.S.C. § 251(a). The Portal-to-Portal Act therefore amended the FLSA to clarify that:

> [N]o employer shall be subject to any liability or punishment under the [FLSA] ... on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee ....
>
> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

> (2) activities which are preliminary to or postliminary to said principal activity or activities ....

29 U.S.C. § 254(a).

The Portal to Portal Act thus draws a key distinction between two types of activities that fell within the Court's broad definition of "work": mere travel or "preliminary" or "postliminary" activities on the one hand (which cannot create liability for an employer), and "principal" activities on the other (which can). The significance of that distinction increased under a Department of Labor regulation first adopted in 1947, which imposes a "continuous workday rule." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 29 (2005). That rule requires that a covered employee be paid for the entire "period between the commencement and completion on the same workday of an employee's principal activity or activities." 29 C.F.R. § 790.6(b). Accordingly, if a particular task assigned to an employee is found to be a "principal" activity, it generally triggers a duty by the employer to compensate the employee until the end of the employee's day, as marked by the completion of the last principal activity. *But see* 29 C.F.R. § 790.7(g) n.49 (noting that although washing and changing clothes may be considered a principal activity in certain circumstances, "[t]his does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be [compensable under the Portal to Portal Act]").

Additionally, when drawing the line between a principal and a "preliminary" or "postliminary"

activity, the Court has held that activities that are "integral and indispensable" to a "principal activity," are not mere preliminary or postliminary activities. *Steiner v. Mitchell*, 350 U.S. 247 (1956). In other words, activities are "preliminary" or "postliminary" under the Portal to Portal Act only if they are *not* "integral and indispensible" to a "principal activity."

Second, Congress further amended FLSA in 1949 to clarify that a collective bargaining agreement ("CBA") may exclude certain activities from the work day entirely. Specifically, Congress inserted subsection (o) in the definitions section of the FLSA. It provides:

> Hours Worked.— In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

Id. § 203(o). Although some in Congress thought that "[t]he Portal-to-Portal Act was [already] intended to cover just such situations,"—likely because clothes-changing time was considered to be the sort of "preliminary" and "postliminary" activity exempted under the § 254(a)(2)—the amendment was passed "to avoid the kind of misunderstanding that arose before." 95 Cong. Rec. 11192, 11210 (1949) (statements of Reps. Herter & Lucas). Thus, where a union and an employer agree that time spent

washing up or changing clothes at the beginning or end of a work day will not constitute "hours worked," such time is excluded entirely from "the hours for which an employee is employed" for purposes of the FLSA's wage requirements.

2. Before beginning each 8-hour shift at U. S. Steel's Gary Works, Petitioners change into protective work clothes. As shown in the picture below, this may include: "flame-retardant pants and jacket, work gloves, metatarsal boots (work boots containing steel or other strong material to protect the toes and instep), a hard hat, safety glasses, ear plugs, and a 'snood' (a hood that covers the top of the head, the chin, and the neck)."

Pet.App.4a-5a. After donning, Petitioners travel from the locker rooms to their work stations, complete their shifts, and then travel back to the locker rooms to change and wash up. Pet.App.2a.

Under the current collective bargaining agreement between Petitioners' union (the United Steelworkers

of America) and U. S. Steel, simply being in the plant or a locker room, or being on their way to a work station has never been considered "being at work." Pet.App.23a-24a; Dct.Dkt.85, App.9-10. Indeed, every CBA in the last 65 years has provided the same. Dct.Dkt.85, App.9-10. Instead, a worker must be at his work station at the beginning of each 8-hour shift. Pet.App.23a-24a.

3. Notwithstanding the agreement of their union to the contrary, Petitioners claim they are entitled to compensation for time they spent donning and doffing before and after each shift as well as the time spent travelling from locker rooms to their work stations and back again.

The district court agreed with U. S. Steel that the time Petitioners spent changing into and out of protective work clothes constituted "changing clothes" for purposes of § 203(o), (and, as such, that time and the related washing time were not "hours for which an employee is employed"). Pet.App.31a-32a. However, the district court refused to grant summary judgment for U. S. Steel on Petitioners' claim that travel time was part of their work day. Pet.App.46a. The court reasoned that, even though the clothes changing and washing time was excluded by § 203(o) from Petitioners' "hours employed," those activities might still constitute "principal" work activities. Pet.App.46a-47a. And if Petitioners' donning, doffing, and washing, were principal work activities, all travel time following donning and preceding doffing would count as work time under the continuous workday rule. Pet.App.71a.

4. A unanimous panel of the Seventh Circuit rejected all of Plaintiffs' positions. The court agreed

that Petitioners' donning and doffing fell within § 203(o). And it reversed the district court's conclusion that Petitioners could be entitled to compensation for their travel time. Pet.App.1a-19a.

Writing for the court, Judge Posner observed that the glasses, ear plugs, and hard hats worn by Petitioners might or might not be "clothing in the ordinary sense," but did not definitively resolve this ambiguity because "in any event putting on the glasses and the hard hat and putting in the ear plugs is a matter of seconds and hence not compensable, because *de minimis*." Pet.App.5a-6a (citing *Mt. Clemens*, 328 U.S. at 692).

The remaining items (pants, jackets, gloves, boots, and hoods) were clothing, the Court of Appeals reasoned, because "[a]lmost any English speaker would say that the [items constituted] work clothes." Pet.App.7a. The court rejected Petitioners' argument that the clothing was instead "personal protective equipment," explaining that this distinction assumed a false dichotomy:

> Protection—against sun, cold, wind, blisters, stains, insect bites, and being spotted by animals that one is hunting—is a common function of clothing, and an especially common function of work clothes worn by factory workers. It would be absurd to exclude all work clothes that have a protective function from section 203(o), and thus limit the exclusion largely to actors' costumes and waiters' and doormen's uniforms.

Pet.App.6a. Indeed, the court added, "it would be beyond odd to say that the word 'clothes' in section

203(o) excludes work clothes" when that very provision "is about changing into and out of clothes at the beginning and end of the workday." Pet.App.7a. "[W]orkers who change at the beginning and end of the workday are changing into and out of work clothes, and if they are governed by a collective bargaining agreement that makes such changing noncompensable the agreement must apply to work clothes, for otherwise the noncompensation provision would have virtually no applications." *Id.*

The Court of Appeals rejected Petitioners' argument that it should depart from the plain meaning of "clothes" in light of "language from a number of cases to the effect that 'exemptions' from the Fair Labor Standards Act are to be construed narrowly." Pet.App.8a. The Court first expressed skepticism that this canon was valid at all, asking, "Why should one provision in a statute take precedence over another?" *Id.* (quoting *Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 508 (7th Cir. 2007)). However, the court concluded that the canon was inapplicable in any event because § 203(o) was not an "exemption," but, rather, was an "exclusion," contained in the "definitions" section of the Act, that "help[ed] to define the scope of the Act." Pet.App.9a.

The court also reversed as "puzzling and paradoxical" the district court's conclusion that "clothes-changing time could be a 'principal activity' even though the employer and the union had decided, as [the district court] agreed they were entitled to do, that changing time is not work time." Pet.App.10a-11a. As the court asked rhetorically, "[i]f it is not work time ... how can it be one of the 'principal activities which the employee is employed to

perform?'" Pet.App.11a. Furthermore, the court noted, although the Supreme Court's analysis in *Steiner* might suggest that changing clothes was outside the Portal to Portal Act absent a CBA to the contrary, *Steiner* itself had "remarked [that] 'the clear implication' of section 203(o) [was] 'that clothes changing and washing, which are otherwise a part of the principal activity, may be expressly excluded from coverage by agreement.'" Pet.App.12a (quoting, *Steiner*, 350 U.S. at 255) (emphasis omitted).

Finally, the Court of Appeals refused to grant deference to a 2010 Administrative Interpretation by the Department of Labor regarding the scope of § 203(o) because the agency's position had shifted repeatedly with the political winds and was not based on "any institutional knowledge of labor markets possessed by the Department's staff—or to anything indeed to which the parties might not have complete access—that might help the court to decide the case sensibly." Pet.App.17a-18a. Moreover, the court noted, every court of appeals to have addressed the issue has "come together in spurning, as Judge Wilkinson has put it, 'the gyrating agency letters on the subject.'" Pet.App.19a (quoting *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 216 n. 3 (4th Cir. 2009)).

REASONS FOR DENYING THE PETITION

I. Although Petitioners claim there is an "entrenched split" regarding whether the work clothes at issue in this case constitutes "clothes" under § 203(o), the single Ninth Circuit decision that conflicts with the decision below has not been followed in almost ten years, and there are good reasons to believe that the Ninth Circuit would

reconsider that decision in an appropriate case. Moreover, the Court of Appeals below, and the numerous other circuits that take the same approach, are also clearly correct, as any specialized and protective aspects of the pants, jackets, gloves, boots, and hoods at issue do not change the fact that they fall squarely within the term "clothes." Finally, and in all events, the question presented is not one of national importance. Rather, the question affects only a small class of employees who work in a unionized workplace, are regularly required to spend non-*de-minimis* amounts of time donning and doffing work clothing, and whose CBA excludes changing time from the work day.

Besides, as the Seventh Circuit explained, Petitioners have been paid a competitive wage pursuant to a CBA that was aggressively negotiated by their union. Therefore, even if Petitioners were to prevail in their claim to count clothes-changing time as additional work *hours*, market forces would compel employers and unions to negotiate a lower pay *rate*, such that overall compensation remained roughly the same. Pet.App.8a. The petition for certiorari therefore implicates only whether Petitioners may obtain a short-term windfall in the form of supra-competitive compensation beyond what was bargained for by their union. *See also Tum v. Barber Foods, Inc.*, 360 F.3d 274, 286 (1st Cir. 2004) (Boudin, J., concurring) ("Unless ... wages are the federal minimum, a decision that now such time is compensable will likely be offset by wage adjustments in the future, leaving only a one-time windfall for employees.").

The scope of the term "clothes" under § 203(o) accordingly does not present the sort of entrenched circuit split of national importance that justifies this Court's review.

II. For similar reasons, there is no basis for this Court to review the question of whether an activity that is properly excluded from "the hours for which an employee is employed" under § 203(o) may nonetheless constitute "a principal activity or activities which such employee is employed to perform" for purposes of the FLSA's overtime requirement.

To begin with, as already described, the resolution of this issue will not meaningfully affect employees' overall wages in the future. Instead, the petition at most would afford Petitioners a short-term windfall in the form of supra-competitive wages beyond those agreed to by their union.

Moreover, the question presented is not subject to a sufficiently developed circuit split to justify this Court's review. The sole appellate decision disagreeing with the decision below, *Franklin v. Kellogg Co.*, 619 F.3d 604 (6th Cir. 2010), is barely two years old. It was rendered (like the decision below) in an interlocutory posture, and so could soon come before the Sixth Circuit again. And that court might well decide to reconsider the issue given the Seventh Circuit's compelling reasoning here—especially since, as Judge Posner noted, the *Franklin* decision "offers only a conclusion, not reasons." Pet.App16a. Moreover, like the *Franklin* decision, the petition also fails to explain how an activity that has been removed entirely from the work day can constitute a principal work activity. Petitioners' only

argument is that §203(o) restricts solely the scope of the FLSA's minimum wage provision (§206) and overtime requirement (§207), and does not alter the scope of the Portal to Portal Act. But Petitioners' claims in this case arise under § 207, not the Portal to Portal Act, so the distinction is of no practical import. In light of the dearth of judicial analysis supporting Petitioners' position, the question of whether an activity covered by § 203(o) may nonetheless be a principal work activity warrants further percolation.

III. Finally, there is no decisional conflict whatsoever regarding whether *de minimis* activities such as donning and doffing a hard hat, safety glasses, or ear plugs are principal activities that render later travel time compensable. Contrary to Petitioners' assertion, neither the First Circuit in *Tum* nor the Supreme Court in *IBP* addressed this question. In *Tum*, the First Circuit held that, even assuming that the previous changing time was a principal activity, the travel time at issue was still non-compensable under the Portal to Portal Act. 360 F.3d at 280-81. And in *IBP*, the Court specifically denied certiorari on this very question, 543 U.S. 1144 (2005), and did not address it in its opinion, 546 U.S. 21. Accordingly, as the Second Circuit noted in *Singh v. City of New York*, 524 F.3d 361 (2d Cir. 2008) (Sotomayor, J.), there is no basis to "read *IBP* as casting doubt on" the consistent holdings of the circuits that a *de minimis* activity "does not trigger the continuous workday rule." *Id.* at 371 n.8. Moreover, in addition to creating no split, the decision below is clearly correct, and, for the reasons already noted, the petition is significant only to the

extent Petitioners seek a short-term windfall in the form of greater wages than their union bargained for.

The petition for a writ of certiorari should accordingly be denied in its entirety.

I. THERE IS NO REASON TO REVIEW THE MEANING OF CLOTHING UNDER § 203(o).

A. The Sole Decision Creating A Split In This Case Is A Dated, Poorly Reasoned Ninth Circuit Decision That Was Issued Without The Benefit Of Later Cases And Which The Ninth Circuit Could Revisit *En Banc*.

As Petitioners acknowledge, four other circuits would agree with the Seventh Circuit that the items at issue in this case constitute "clothes" under § 203(o); only a single decision by the Ninth Circuit suggests a contrary result. *See* Pet. 16-17 (citing *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1139 (10th Cir. 2011); *Franklin*, 619 F.3d at 614; *Sepulveda*, 591 F.3d at 215; *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 955 (11th Cir. 2007); *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003)).[2] Noting that the

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[2] Petitioners assert that the Seventh Circuit created a three-way split by refusing to treat accessories such as glasses, ear plugs, and hard hats, as clothing. Pet.17. However, as explained above, *supra* at 8, the court did not in fact resolve this question. Rather, it merely noted that it was unclear whether such items were "clothing in the ordinary sense" and held that "in any event putting on the glasses and the hard hat and putting in the ear plugs is a matter of seconds and hence not compensable, because *de minimis*." Pet.App.5a-6a. Thus, this case does not present the question of whether glasses, ear plugs, and hard hats are clothing, and all the cases apart from *Alvarez* are in agreement regarding the items held to be clothing in this case.

later decisions issued between 2007 and 2011 have been sharply critical of the Ninth Circuit's 2003 decision in *Alvarez*, Petitioners assert that there is an "entrenched circuit conflict" that warrants this Court's review. Pet.16. Not so.

To the contrary, there are good reasons to believe that the Ninth Circuit would reconsider its decision in *Alvarez* in an appropriate case, thereby eliminating any split.

To begin with, the decision in *Alvarez* was handed down in 2003, before any decision from another circuit had shed light on the issue. Indeed, Respondent has not found a single case in which the Ninth Circuit has considered the scope of § 203(o) since *Alvarez*. As described below, *infra* at 18-21, 26-27, this may reflect that the issue in this case does not have broad significance and can be easily worked around by employers and unions. However, to the extent another case presents the same issue in the Ninth Circuit, an employer would have a compelling basis to request that the Ninth Circuit reconsider *Alvarez en banc*.

Moreover, perhaps due to its relative age, the reasoning of *Alvarez* is extraordinarily thin. The court offered two bases for its holding:

First, it reasoned that subsection 203(o) should not be read to include protective clothing because "FLSA exemptions ... are to be narrowly construed against the employers seeking to assert them" and the clothing at issue "does not plainly and unmistakably fit within §3(o)'s 'clothing' term." 339 F.3d at 905 (internal quotation marks omitted). However, while the maxim that FLSA exemptions should be construed against the employer is dubious to begin

with, Pet.App.8a, it is doubly indefensible in this context. As the Seventh Circuit noted, subsection 203(o) is a definitional provision that sets the scope of the Act itself, not an "exemption." Pet.App.9a. Moreover, subsection 203(o) was inserted by a separate amendment that was enacted precisely to narrow prior judicial interpretations of the FLSA that Congress felt were too expansive, *see supra* at 2-5; in that context, continuing to presume that Congress wanted the FLSA to be read broadly would border on the obtuse.

Second, the court reasoned that "specialized protective gear" was different from "typical clothing." 339 F.3d at 905. According to the court, "[t]he admonition to wear warm clothing, for example, does not usually conjure up images of donning a bullet-proof vest or an environmental spacesuit. Rather, personal protective equipment generally refers to materials worn by an individual to provide a barrier against exposure to workplace hazards." *Id.* However, as the Court of Appeals convincingly explained in this case, there is no basis to assume that an item must be *either* clothing *or* "protective gear," and no basis to assume that "clothes" does not include protective work clothes. Rather, "[p]rotection ... is a common function of clothing, and an especially common function of work clothes worn by factory workers," and "it would be beyond odd to say that the word 'clothes' in section 203(o) excludes work clothes" when that very provision "is about changing into and out of clothes at the beginning and end of the workday." Pet.App.6a-7a. *Alvarez* is accordingly so poorly reasoned as to be ripe for reconsideration.

The petition accordingly does not present the sort of entrenched, current split that would warrant this Court's review.

B. The Decision Below And The Four Other Circuits That Agree With It Are Correct.

The decision below, as well as the decisions from the four circuits that take a consistent approach, are plainly correct. Specialized and protective work clothing is still a type of "clothing." And when Congress provided that a union and an employer could agree to place time spent "changing clothes" outside of the compensable work day, it obviously contemplated agreements regarding protective work clothes.

Apart from echoing the Ninth Circuit's false dichotomy between specialized protective clothing and clothing, Pet.23-24, Petitioners offer only one additional argument for why the decision below was incorrect: According to Petitioners, deciding whether ordinary English speakers would label specialized or protective clothing as "clothes" would present "intractable problems of interpretation," while treating all specialized or protective clothing as non-clothing "avoids these difficulties." Pet.25. As an initial matter, no matter how attractive a bright-line rule might be in the abstract, courts are not free to create them where doing so requires ignoring the plain text of a statute duly enacted by Congress. Indeed, redefining "clothes" to mean only "pants" might arguably produce a somewhat brighter line. But it would obviously ignore clear congressional intent. Likewise, redefining "clothes" to mean non-specialized, non-protective clothes, would ignore the plain meaning and clear purpose of § 203(o).

Worse, Petitioners' proposed rule does not even have the virtue of clarity that they claim. It merely trades one line-drawing task (What is clothing?) for another (When is clothing "specialized" and "protective"?). The latter question offers no greater precision in exchange for its departure from congressional intent. If a thick denim jacket treated with a flame retardant chemical is specialized protective clothing, is a thick, untreated denim jacket as well? A thin denim jacket? A long-sleeve shirt? The incoherence of distinguishing between these items of clothing only confirms the error of Petitioners' approach.

C. The Question Presented Has No Importance Beyond Its Potential To Provide A Short-Term Windfall To Petitioners.

Finally, even if there were an entrenched split on the definition of clothing under § 203(o), this Court's review would still not be warranted because the issue is not one of national importance. To the contrary, the question presented implicates only a small category of employees and affects only whether those employees who file lawsuits may obtain the short-term windfall of extra compensation beyond what was bargained for by their unions.

On its face, § 203(o) is only relevant to a small number of U.S. employees. The provision applies only where clothes-changing time is "excluded from measured working time ... under a bona fide collective-bargaining agreement." In 2011, only 6.9 percent of private-sector employees were union

members.[3] Moreover, even the Ninth Circuit did not hold that time spent changing into *non*-specialized protective clothing must count as work time. 339 F.3d at 903-04. And it is undisputed that employees have no right to compensation for *de minimis* activities. *Id.* Thus, the petition, on its face, could affect only the tiny subgroup of the 6.9% of private workers who wear protective work clothing that cannot be put on or taken off in a *de minimis* amount of time, and is not compensated for this time pursuant to a CBA.

More fundamentally, even this small subgroup would not be affected in any meaningful way, no matter how the question presented were resolved. Petitioners and the workers they purport to represent benefited from an aggressively-negotiated CBA in which their union obtained the best compensation for them it could in a competitive market. Pet.App.8a. That agreement excluded hours spent changing clothes or travelling to employees' work stations, and had those additional hours been counted, market forces would have required that Petitioners' accept a lower base rate. *Id.* Having received the benefits of that bargain (a higher pay rate for time actively engaged at work stations), Petitioners would now like the windfall of additional compensation for hours that were not to be counted in their work day.

However, as the Seventh Circuit recognized:

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[3] U.S. Dept. Labor, Bureau of Labor Statistics, Union Members—2011 at 1 (Jan. 27 2012) *available at* http://www.bls.gov/news.release/pdf/union2.pdf.

> If the workers have a legal right to be paid for [clothes-changing time], the company will be less willing to pay them a high wage for the time during which they are making steel; it will push hard to reduce the hourly wage so that its overall labor costs do not rise. The steel industry is international and highly competitive, and unions temper their wage demands to avoid killing the goose that lays the golden eggs. They don't want the American steel industry to go where so much American manufacturing has gone in recent years—abroad. The plaintiffs are adverse to their union, to the interests of other steelworkers, and to their own long-term interests.

Pet.App.8a. Judge Boudin noted the same likelihood in *Tum*, 360 F.3d 274:

> [I]t appears that wages at the Barber plant were set against a background practice of treating as non-compensable the donning, doffing, walking and waiting involved in this case. Unless those wages are the federal minimum, a decision that now such time is compensable will likely be offset by wage adjustments in the future, leaving only a one-time windfall for employees.

Id. at 286 (Boudin, J., concurring).

Indeed, despite being pressed repeatedly at oral argument for an explanation of how Petitioners' position could affect net compensation for employees in the future, the attorney for the Department of Labor was entirely unable to offer one. *See* Oral Argument at 43:35-49:00, *Sandifer v. U. S. Steel*, 678

F.3d 590 (7th Cir. 2012) (No. 10-1821) *available* at http://www.ca7.uscourts.gov/fdocs/docs.fwx?submit=showbr&shofile=10-1821_001.mp3.

Creating a short-term windfall for a small group of plaintiffs (and their attorneys) without meaningfully altering compensation for employees going forward is not an issue of national importance that warrants this Court's review.[4]

II. THERE IS NO REASON TO REVIEW WHETHER AN ACTIVITY THAT IS PROPERLY EXCLUDED FROM THE WORK DAY UNDER § 203(o) CAN STILL BE A PRINCIPAL WORK ACTIVITY.

A. The Decision Below Is Correct.

It is undisputed that if Petitioners' first activity upon entering U. S. Steel's plant were walking to their work stations, this travel time would fall within the scope of the Portal to Portal Act and could not be the basis of an overtime claim by Petitioners. However, under the continuous workday rule, such time would be compensable if it occurred *within* the

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[4] Petitioners suggest that some employers might find it inconvenient to set employee compensation given the outlier rule in the Ninth Circuit. Pet.16. But there is no basis to believe this hypothetical would have any impact on Petitioners, and neither a union nor an employer has raised such a concern in this case. Indeed, even Petitioners' own union did not participate in this case below, and no union has sought to support Petitioners' petition for certiorari as an *amicus curiae*. This silence is telling. If and when an employer finds this issue to be inconvenient, it can petition the Ninth Circuit to reconsider its decision in *Alvarez en banc* and, barring a reversal, can seek certiorari from that decision.

continuous workday—triggered by the performance of the first principal activity—rather than *preceding* the workday. *IBP*, 546 U.S. at 34 ("Walking to [the place of performance] before starting work is excluded from FLSA coverage, but the [Portal to Portal Act] does not exclude walking from that place to another area within the plant immediately after the workday has commenced."). Thus, whether overtime compensation is owed for the travel time in this case turns on whether Petitioners' clothes changing was a principal activity that triggered the start of the workday.[5]

The Seventh Circuit was clearly correct in holding that Petitioners' clothes changing did not start their workday. The plain text of § 203(o) provides that a union and an employer may agree that time spent changing clothes will not be "work" time under the FLSA:

> *Hours Worked.*—In determining for the purposes of sections 206 and 207 of this title the hours *for which an employee is employed*, there shall be excluded any time spent in changing clothes ... which *was excluded from measured working time* ... under a bona fide collective-bargaining agreement ....

29 U.S.C. § 203(o) (emphasis added).

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[5] For travel time at the end of the day, the analysis would of course be the reverse—travel time would be compensable only if the clothes changing was a principal activity that marked the end of the workday.

As Judge Posner explained, if, under § 203(o), changing clothes is not an activity "for which an employee is employed," *id.*, it cannot possibly "be one of the '*principal* activities which the employee is employed to perform.'" Pet.App.11a (quoting 29 U.S.C. § 254(a)) (emphasis added). Likewise, this Court in *Steiner* specifically noted that "the clear implication [of section 203(o)] is that clothes changing and washing, which are otherwise a part of the principal activity, may be expressly excluded from coverage [of the FLSA] by agreement." *Steiner*, 350 U.S. at 255.

Accordingly, for purposes of determining whether Petitioners are entitled to the overtime compensation they seek, clothes-changing does not constitute an activity for which Petitioners are employed *at all*, let alone a *principal* activity of such employment.

Petitioners' sole response is that § 203(o) is relevant only "in determining for the purposes of section[s] 206 and 207 of this title the hours for which an employee is employed" and "simply does not apply or even refer to determinations under [the Portal to Portal Act] as to whether an employee is engaged in a principal activity." Pet.26. But this argument confuses the nature of Petitioners' claim and the role of the Portal to Portal Act.

Petitioners' claim for overtime in this case *arises under § 207*, not the Portal to Portal Act (which is a shield for employers, not a sword for employees). *See* Pet.App.20a. Section 203(o), in turn, is subject to two, independent limitations. *First*, Section 203(o) amended the "Definitions" section of the FLSA such that Petitioners' clothes changing is excluded from the definition of "hours worked." Such time,

according to the language of the statute, is not time "for which [Petitioners' are] employed," or engaged in work, for purposes of § 207. *Second*, the Portal to Portal Act provides that, in applying § 207, Petitioners are also not entitled to compensation for travel time that is not preceded by a principal activity.

Accordingly, in determining if overtime compensation is owed under § 207, *both* § 203(o) *and* the Portal to Portal Act must be read together. When thus read, it is clear that § 207 does not give Petitioners a right to compensation for their travel time because the travel time occurred before the start of Petitioners' workday (by operation of § 203(o)) and is the sort of preliminary activity that is outside the scope § 207 (by operation of the Portal to Portal Act).

This reading, moreover, is the only one consistent with the purpose of § 203(o) and the Portal to Portal Act. Congress passed the Portal to Portal Act precisely because it disagreed with the Court's earlier approach of defining work to include travel time at the beginning and end of the day. In particular, Congress was concerned that such a rule refused to give effect to "long-established customs, practices, and contracts between employers and employees." 29 U.S.C. § 251(a). Moreover, Congress enacted § 203(o) to clarify that unions and employers should be free to agree not only that washing and clothes-changing time would be uncompensated, but also that it would not count as part of the work day at all. Thus, Congress clearly intended that, with regard to activities such as travel, changing clothes, and washing up, employers and unions would be free to define the workday as they saw fit.

B. The 1-1 Split Identified By The Petition Would Benefit From Further Percolation.

Although the Sixth Circuit took a contrary approach to the question of whether § 203(o) activity can start the workday in *Franklin*, 619 F.3d at 618-19, that recent decision, as the Seventh Circuit noted, "offers only a conclusion, not reasons." Pet.App16a.

Specifically, the Sixth Circuit simply stated that it "agree[d]" with several district court decisions that had held that activities covered by § 203(o) could still be a principal work activity because "§ 203(o) only addresses the compensability of the time, not whether it is integral and indispensable [to a principal work activity]." *Franklin*, 619 F.3d at 618-19. Remarkably, neither *Franklin*, nor any of the district court decisions on which it relied, explains the conclusion that "§ 203(o) only addresses the compensability of" covered activities. Nor does Franklin attempt to reconcile this assertion with the plain text of the § 203(o)—which, as just discussed, provides that covered activities are excluded entirely from "the hours for which an employee is employed."

Besides, like this case, *Franklin* came before the Sixth Circuit in an interlocutory posture. It could soon return after final judgment and, given the stark contrast between the Seventh Circuit's extensive reasoning and *Franklin*'s threadbare conclusion, the matter would be ripe for reconsideration by the Sixth Circuit at that time. Other quarters, too, deserve to be heard from for a thorough vetting of the issue before this Court's resources are expended. In short, in light of the lack of reasoning offered by *Franklin*, as well as the recent vintage of that decision, the 1-1

split between *Franklin* and the decision below would benefit from further percolation.

C. Whether Activities Covered By § 203(o) Can Commence The Work Day Has No Importance Beyond Its Potential To Provide A Short-Term Windfall To Petitioners.

Even if the issue were subject to a mature split, it does not have sufficient significance to warrant this Court's review. For the reasons already noted, *supra* at 18-21, 26-27, the resolution of this issue will not have any significant impact on the overall welfare of employees. Rather, if Petitioners were to prevail in this case, market forces would compel employers and unions to agree to a rate for the increased hours worked that resulted in equivalent overall compensation.

Moreover, employers could also adjust to Petitioners' travel time rule in many cases simply by rearranging the order of required activities such that employees travel first and don their work clothes in close proximity to their work stations. Pet.App.13a ("Employers would also be moved to limit the time they allowed their workers for travel . . . and perhaps to reduce travel time further by moving the locker rooms closer to the work stations.").

Thus, this case at most offers the possibility of a short-term windfall for Petitioners and does not present the sort of nationally important issue that warrants this Court's review.

III. THERE IS NO REASON TO REVIEW WHETHER *DE MINIMIS* ACTIVITIES OF THE SORT IN THIS CASE ARE PRINCIPAL ACTIVITIES THAT RENDER LATER TRAVEL TIME COMPENSABLE.

A. The Decision Below Does Not Conflict With Any Decision From This Court Or A Court Of Appeals.

Finally, there is no decisional conflict whatsoever over whether *de minimis* activities such as donning and doffing a hard hat, safety glasses, or ear plugs are principal activities that render later travel time compensable. Petitioners' assertion that this issue was addressed by the First Circuit in *Tum*, 360 F.3d 274, and this Court in *IBP*, 546 U.S. 21, mischaracterizes those decisions.

In *Tum*, employees appealed a district court judgment that denied them compensation for travel time between the locker rooms where they changed into work clothes and their work stations. 360 F.3d at 278. Although a jury had found that the time spent actually donning and doffing was *de minimis*, the employees did not appeal that finding, *id.*, and the First Circuit did not address or rely on it. Instead, the court concluded that, even assuming that donning and doffing was a principal and compensable activity, travel time between the locker rooms and the workstations would still be non-compensable because it fell within the travel-time exemption of the Portal to Portal Act. *Id.* at 280-81. Thus the First Circuit in *Tum* clearly did not hold that a *de minimis* activity could render later travel time compensable.

Indeed, not even the lone concurrence cited by Petitioners suggested such a result. To the contrary, the concurrence noted only, that, *under the position advocated by the Secretary of Labor*, a *de minimis* activity could render later travel time compensable *Id.* at 285 (Boudin, J., concurring). Such an anomalous result, Judge Boudin noted, was "[o]ne further basis for *resisting* the Secretary." *Id.* (emphasis added).

Nor did this Court consider whether *de minimis* activities could render later travel time compensable when it reviewed *Tum* as part of the consolidated decision in *IBP*. The Petitioner in *Tum* sought certiorari on three questions presented, the third of which was whether "walking and waiting time [could be] rendered non-compensable merely because the associated compensable donning or doffing time is *de minimis*." Petition for Writ of Certiorari, *IBP*, 546 U.S. 21 (No. 04-66), 2004 WL 1588308, at *i. In opposing certiorari, the respondent correctly explained that review of that issue was not warranted because it "was not addressed by the court of appeals and played no part in its decision." Brief in Opposition, *IBP*, 546 U.S. 21 (No. 04-66), 2005 WL 39879, at *7. The Court then denied certiorari on this question, and granted certiorari "limited to Question 1 presented by the petition." *Tum*, 543 U.S. 1144.

Not surprisingly, neither the respondent's brief in *IBP* nor the Court itself addressed whether a *de minimis* activity can be a principal activity that renders associated travel time compensable. *See* Brief for Respondent, *IBP*, 546 U.S. 21 (No. 04-66), 2005 WL 1841383; *IBP*, 546 U.S. at 32. *See also*

Singh, 524 F.3d at 371 n.8 (Sotomayor, J.) (stating that "the law of this circuit—at least since [*Reich v.*] *New York City Transit Authority*[,45 F.3d 646 (1995)]" is that a *de minimis* activity "does not trigger the continuous workday rule" and that "[w]e do not read *IBP* as casting doubt on this holding").

Petitioners have thus cited no decision that creates a conflict with the Seventh Circuit's conclusion that the *de minimis* activities in this case were not principal activities.

B. The Decision Below Was Correct.

The decision below was also correct to conclude that the *de minimis* activities in this case were not principal activities. As the Court noted in *Mt. Clemens*:

> The *workweek* contemplated by [the FLSA] must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable *working* time is involved.

328 U.S. at 692 (emphases added). Thus, *Mt. Clemens* suggests that time spent on *de minimis* activities are not counted as time an employee is "employed" *at all*. It follows *a fortiori* that *de minimis* activities cannot be "a principal activity or activities which such employee is employed to perform." 29 U.S.C. § 254(a). *See also Tum*, 360

F.3d at 285 (Boudin, J., concurring) (noting that *Mt. Clemens* suggests "that a *de minimis* activity which is non-compensable time under *Mt. Clemens* does not start of[f] the workday").

This view, moreover, is the only one consistent with both common sense and the policies of the FLSA. The FLSA, as amended by the Portal to Portal Act and § 203(o), was intended to require compensation only for a workday beginning when a worker is customarily considered "on the job"—*i.e.*, with the completion of the first, significant, principal activity for which he or she is employed. Consistent with that policy, it is undisputed that where a worker's first activity at an employer's facility is to travel to his or her work station, the travel time is not considered part of the work day. Yet there is no conceivable policy basis to hold that the "[s]plit-second absurdit[y]" of donning a hard hat at the entrance to the plant would convert all subsequent travel time into working time. Indeed such a rule would "bear an uncanny resemblance to that which prompted the Portal-to-Portal Act." 360 F.3d at 286 (Boudin, J., concurring).

C. The Question Presented Is Unimportant And Does Not Justify This Court's Review.

For similar reasons as already described, whether an employer is forced to pay employees a lower base wage for a larger number of hours rather than a higher base wage for a smaller number of hours, will not have a meaningful impact on the welfare of either employees or employers. Rather, the issue is significant only to the extent Petitioners seek a short-term windfall in the form of greater wages than their

union bargained for. The petition should accordingly be denied on this question as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

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REPLY BRIEF

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IN THE

Supreme Court of the United States

CLIFTON SANDIFER, *et al.*,

Petitioners,

v.

UNITED STATES STEEL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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I. THE DECISION OF THE COURT OF APPEALS IS CLEARLY IN CONFLICT WITH DECISIONS IN THE SIXTH AND NINTH CIRCUITS

The Seventh Circuit decision candidly emphasized that its opinion was in disagreement with the decisions of several other circuits. Respondent acknowledges that this case presents two circuit conflicts. "[T]he . . . Ninth Circuit decision . . . conflicts with the decision below." (Br. Opp. 10). "[T]he Sixth Circuit took a contrary approach to the question of whether § 203(o) activity can start the workday." (*Id.* 25).

(1) The uncertainty caused by those two circuit conflicts has been compounded by the position of the Department of Labor. In June 2010 the Department issued a lengthy "Administrator Interpretation" addressing in detail both of the questions that are the subject of these conflicts. 2010 WL 2468195. The Administrator of the Wage and Hour Division adopted the "analysis of the Ninth Circuit in *Alvarez* [*v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003)]," holding that "the § 203(o) exemption does not extend to protective equipment that is required by law, by the employer, or due to the nature of the job." *Id.* With regard to the second question presented, the Administrator concluded that "clothes changing covered by 203(o) may be a principal activity. Where that is the case, subsequent activities, including walking and waiting, are compensable." *Id.* In *Franklin v. Kellogg Co.*, 619 F.3d 604 (6th Cir. 2010), decided

two months after the issuance of the Administrator's Interpretation, the Sixth Circuit expressly relied on the Interpretation in holding that clothes changing covered by section 203(o) can mark the start of a continuous work day. 619 F.3d at 618. The 2010 Administrator Interpretation was consistent with opinion letters that had been issued by the Department in 1997 and 2001[1], but inconsistent with opinion letters issued in 2002 and 2007.[2]

The 2010 Administrator Interpretation is of considerable practical importance, because the Wage and Hour Division has a major enforcement role, bringing hundreds of FLSA actions every year and investigating and settling even more. The Administrator Interpretation, in the face of the acknowledged circuit conflicts, has posed confounding problems for employers. Some management law firms and attorneys have advised employers to comply with the 2010 Administrator Interpretation[3]; others have suggested that it is simply unclear what employers should now do.[4]

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[1] 1997 WL 998048; 2001 WL 58864.

[2] 2002 WL 33941766; 2007 WL 2066454.

[3] "[I]n practical terms . . . [a]n organized employer that requires its employees to wear protective gear must pay them for the time spent donning and doffing such gear, which obligation cannot be avoided through collective bargaining . . . ." http://www.crowell.com/NewsEvents/AlertsNewsletters/all/Department-of-Labors-Wage-and-Hour-Division-Provides-Answers-Raises-New-Questions (visited Jan. 29, 2013)

[4] "The DOL's recent interpretation substantially affects employers with employees who don and doff protective

It is the general practice of the Wage and Hour Division not to bring civil actions against employers for practices that are lawful under controlling circuit precedent. The Division will enforce the Administrator's Interpretation in eight circuits, but apparently will not seek to enforce its interpretation of "clothes" in the Fourth, Sixth, Seventh and Tenth Circuits, or seek to enforce in the Seventh Circuit its view that clothes-changing covered by section 203(o) can trigger the start of the work day. This crazy quilt pattern of enforcement, possibly shifting over time as other circuits weigh in, will continue until the underlying issues have been finally addressed by this Court.

(2) In 2005, when this Court declined to review *Alvarez*'s interpretation of section 203(o), the Solicitor General had pointed out that the Ninth Circuit decision was not then in conflict with decisions in any other circuit.[5] Now, however, there are four circuits which have rejected the Ninth

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equipment. . . [I]t is recommended that employers promptly confer with legal counsel to assess whether their current compensation practices comport with the DOL's latest interpretation of the FLSA." Laurent Badoux and Michael Lehet, "Department of Labor Issues Interpretation Narrowing Clothes-Changing Exclusion and Expanding Scope of Compensable Workday," ASAP (Littler Mendelson, P.C.), (June 2010).

[5] Brief for the United States as Amicus Curiae, *IBP, Inc. v. Alvarez*, No. 03-1238; see 543 U.S. 1144 (limiting certiorari to Question 1).

Circuit's interpretation of that provision, albeit disagreeing among themselves as to the meaning of "clothes." The conflict that did not exist in 2005 clearly has now developed and should be resolved by this Court.

There is no reason to believe, as respondent suggests, that the Ninth Circuit is going to repudiate its longstanding interpretation of section 203(o), particularly in light of the fact that the Department of Labor has now emphatically endorsed the Ninth Circuit decision in *Alvarez*. That Ninth Circuit precedent has repeatedly been applied by the lower courts.[6] Respondent suggests that "[i]f and when an employer finds this issue to be inconvenient, it can petition the Ninth Circuit to reconsider its decision in *Alvarez en banc*." (Br. Opp. 21). That is entirely unrealistic. To get this issue again before the Ninth Circuit, an employer would first have to persuade the relevant union to agree to a collective bargaining agreement that denied union members wages to which they were legally entitled in that Circuit; it is difficult to imagine why any union would agree to that. The employer would then have to deliberately engage in a systemic practice of refusing to pay wages required by Ninth Circuit precedent, and hope that some of its workers would file suit under the FLSA. Such a step would involve unacceptable

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[6] *E.g.*, *Spoerle v. Kraft Foods Global*, 527 F.Supp.2d 860, 867, 868 (W.D.Wisc. 2007); *Perez v. Mountaire Farms, Inc.*, 2008 WL 2389798 at *2-*5 (D.Md. June 10).

financial risk; the total judgment against the defendant in *Alvarez* was more than $9 million.

Respondent argues that the Sixth Circuit is likely in *Franklin* itself to grant a petition for rehearing en banc at some point in the future. (Br. Opp. 25). In fact, however, the defendant in *Franklin* already filed just such a petition for rehearing, which was denied on October 25, 2010. There is no possibility that the defendant in *Franklin* will try again in some later appeal—the parties to that litigation have now agreed on the terms of a settlement. As would be true in the Ninth Circuit, an employer in the Sixth Circuit could only challenge *Franklin*'s holding by persuading a union to agree to a collective bargaining agreement that violates *Franklin*, and then exposing itself to a large backpay claim in the hope that its workers would file suit under the FLSA. It is highly unlikely that any employer would do so.

Although only two circuits have addressed the second question presented, that was also the case in *Christopher v. Smithkline Beecham Corp.*, 132 S.Ct. 2156, 2168 (2012); because the second question presented (like the first) governs practices in several major industries employing hundreds of thousands of workers, it is important that they be resolved by this Court without further delay.

(3) As then Judge Sotomayor noted in *Singh v. City of New York*, 524 F. 3d 361, 372 n. 8 (2d Cir. 2008), this Court's decision in *Tum v. Barber Foods,*

Inc., 546 U.S. 21 (2005), "impl[ied] that . . . post donning/pre-doffing walking time should have been part of the . . . *de minimis* analysis." Such a rule would be of controlling importance here, because the travel time at issue (usually on a bus across an exceptionally large plant complex) was usually substantial.

This third question would not by itself warrant review by this Court. But the longstanding dispute about the significance of donning and doffing protective gear may lack a final resolution if certiorari is limited to the first two questions presented. The third question is intertwined with the first two. The practical significance of holding certain protective gear outside the scope of section 203(o) will turn on whether a *de minimis* principal activity would mark the start of the work day. For that reason all of these issues should be before the Court at the same time.

II. THE QUESTIONS PRESENTED ARE OF EXCEPTIONAL IMPORTANCE

There is a large and growing volume of litigation regarding the scope and significance of section 203(o). In a period of three years, there have been appellate decisions in the Fourth, Sixth, Tenth and now Seventh Circuits regarding these issues. "Section 203(o) is a crucial provision for all unionized employers whose employees are required to don and doff mandatory attire at the workplace." "Department of Labor's Second Administrator's

Interpretation May Drastically Affect Unionized Negotiations Over Compensable Time," 19 Labor & Employment Law Update, No. 5 at 2 (2010).

The questions presented by this case are of great importance to several major industries which both are highly unionized and involve unusual workplace dangers that require specialized protective gear. Most of the section 203(o) litigation has concerned three specific industries where those circumstances exist—meatpacking[7], poultry processing[8], and the production and forging of metals.[9] In the steel industry, for example, most production workers are unionized. The total union membership in these three industries is far larger than the number of industry pharmaceutical representatives potentially affected by the issue in *Christopher v. Smithkline Beecham Corp.*, 132 S.Ct.

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[7] *Spoerle v. Kraft Foods Global, Inc.*, 626 F.Supp.2d 913 (W.D.Wis. 2009); *In re Cargill Meat Solutions Wage and Hour Litigation*, 632 F.Supp.2d 368 (M.D.Pa. 2008); *Sisk v. Sara Lee Corp.*, 590 F.Supp.2d 1001 (W.D.Tenn. 2008); *Gonzalez v. Farmington Foods, Inc.*, 296 F.Supp.2d 912 (N.D.Ill. 2003).

[8] *Salazar v. Butterball, LLC*, 644 F.3d 1130 (10th Cir. 2011); *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209 (4th Cir. 2009); *Anderson v. Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007); *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003); *Israel v. Raeford Farms of Louisiana, LLC*, 784 F.Supp.2d 653 (W.D.La. 2011); *In re Tyson Foods, Inc.*, 694 F.Supp.2d 1358 (M.D.Ca. 2010).

[9] In addition to the instant case see *Adams v. Alcoa, Inc.*, 822 F.Supp.2d 156 (N.D.N.Y. 2011)(aluminum); *Andrako v. United States Steel Corp.*, 632 F.Supp.2d 398 (W.D.Pa. 2009); *Figas v. Horsehead Corp.*, 2008 WL 4170043 (W.D.Pa. Sept. 3, 2008)(zinc).

2156 (2012). While the portion of the overall national workforce that is unionized has declined in recent decades, that is largely the result of employment growth in non-unionized industries where workers do not face similar safety risks. For example, although reckless practices in the rapidly expanding and generally non-unionized financial services sector may endanger the financial security of millions of Americans, investment bankers do not need to wear protective safety gear.

The importance of the questions presented by this case is reflected in the actions of the Department of Labor. Administrator Interpretations are issued only in situations where the Department concludes that they "will be useful in clarifying the law as it relates to an entire industry, a category of employees, or to all employees" and are intended to provide "guidance and compliance assistance to the broadest number of employers and employees."[10] The 2010 Interpretation was issued "to assist employees and employers in all industries." 2010 WL 2468195. The very fact that the Department has twice revisited and changed its interpretation of section 203(o) is indicative of the great significance of this issue to employers and employees alike. The importance of these issues is attested to as well by the large number of amicus briefs submitted in these cases in the courts of appeals. Briefs were submitted in the instant case by Department of Labor, the

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[10] http://www.doc.gov/whd/opinion/opinion.htm (visited Jan 29, 2013).

National Association of Manufacturers, and the United Food and Commercial Workers, in *Alvarez* by the Department of Labor, and in *Salazar v. Butterball, LLC,* 644 F. 3d 1130 (10th Cir. 2011), by the United Food and Commercial Workers and the National Employment Lawyers Association.

Respondent argues that the questions presented are of no practical importance, asserting that if this Court requires that workers be paid overtime for time spent donning and doffing safety gear, or for travel time post-donning or pre-doffing, United States Steel and other employers will simply lower their straight time wage levels enough so that workers receive no net additional income . (Br. Opp. 11, 12, 19-21, 26). On this view FLSA overtime claims and the FLSA overtime provision itself never produce any real long term benefit to workers, and thus could not be important enough to warrant review by this Court of legal issues related to such claims.

This Court, however, has repeatedly granted certiorari to resolve legal issues arising out of overtime claims.[11] Employers themselves, which presumably would not bother seeking review of unimportant issues, have repeatedly and successfully sought review by this Court in overtime

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[11] *Christopher v. Smithkline Beecham Corp.*, 132 S.Ct. 2156 (2012); *Auer v. Robbins*, 519 U.S. 452 (1997); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988).

cases.[12] In *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), the plaintiffs sought compensation for time spent walking between locker rooms and production areas. Rather than simply agreeing to pay for that time and then lowering wage levels to recoup the cost, the company fought the claim for years and successfully urged this Court to review the underlying legal dispute. In *Steiner v. Mitchell*, 350 U.S. 247 (1956), the only question at issue was whether the government could obtain a prospective order requiring overtime payments. In that case as well it was the employer that sought review by this Court, arguing that the case presented an important question.

The Court's past decisions to grant certiorari in overtime cases, and the repeated efforts by employers themselves to seek review, reflect the realities of labor relations. Except in the case of firms facing financial collapse, it is virtually unheard of for employers to lower their straight time wage rates; any attempt to do so would ordinarily trigger enormous resistance and morale problems. Where, as in the instant case, some workers have devoted more time than others to uncompensated overtime periods, an employer that sought to recoup legally required overtime payments would have to either lower the total wages of the workers with shorter overtime periods or create individualized wage rates based on each worker's travel or donning and doffing

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[12] *Icicle Seafoods v. Worthington*, 475 U.S. 709 (1986); *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972).

time, an administrative nightmare. Throughout the history of the FLSA, federal and state courts have ordered employers to pay overtime; respondent cannot identify a single case in which the employer responded by lowering wage rates to recoup the additional expense. United States Steel has plants in the Ninth Circuit, which for a decade have been subject to the rule in *Alvarez,* and in the Sixth Circuit, which for several years now have been governed by the rule in *Franklin.* In spite of this, respondent does not claim that it ever evaded the overtime requirements of *Alvarez* or *Franklin* by lowering wage rates. Manipulating wage rates to avoid the cost of FLSA mandated overtime payments would at least ordinarily be illegal. 29 C.F.R. § 778.500. Any employer seeking to invoke section 203(o) would by definition be a party to a collective bargaining agreement; a unilateral alteration of wage rates would violate any such agreement, and a union would be unlikely to agree to such a change. The only place where payment of federally mandated overtime automatically results in a concomitant and equal reduction in straight time wages is the faculty lounge of the University of Chicago School of Law.

Respondent argues that an FLSA case regarding a claim for travel time within a plant would never be important enough to warrant review by this Court, because an employer directed to compensate workers for such time would simply reconfigure its facility to eliminate the travel period. (Br. Opp. 26). But this Court granted certiorari in *IBP Inc. v. Alvarez,* which presented just such a

travel time claim. In that case the United States Chamber of Commerce, in an amicus brief written by the same law firm that now represents United States Steel, objected that reconfiguring plants to eliminate walking time would often be impractical because it would "compromise the operational efficiency of the plant or factory." See 2005 WL 1826318 at *14 n. 15. In the instant case such reconfiguration would be entirely impossible.

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

The court of appeals squarely decided each of the questions presented, and did not base its decision on any alternative ground. This case thus presents an excellent vehicle for resolving each of those questions.

This case is a particularly appropriate vehicle for resolving the meaning of "changing clothes" under section 203(o) because it involves three distinct types of gear: (a) protective gear that is specialized (e.g. flameproof jackets and pants), (b) protective gear that is not specialized (e.g., safety glasses and hardhats), and (c) protective gear that does not resemble an ordinary article of clothing (e.g., snoods and wristlets). In the proceedings below petitioners expressly argued (and adduced evidence) that the donning and doffing of these items, including the jacket and pants, did not constitute "changing" clothes because they were put on *over*—

rather than being substituted for--a worker's street clothes.

This appeal is also ideal for resolving whether activity excluded from compensation by section 203(o) can nonetheless constitute a principal activity that marks the commencement (and end) of the continuous workday. The court of appeals correctly concluded that the donning and doffing of the gear in question would ordinarily constitute such a principal activity; whether section 203(o) somehow renders those actions non-principal activities is thus of controlling importance.

CONCLUSION

A writ of certiorari should issue to review the judgment of the court of appeals. In the alternative, as in *IBP, Inc. v. Alvarez*, the Solicitor General should be invited to file a brief expressing the views of the United States.

Respectfully submitted,

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JOINT APPENDIX

No. 12-417

In The
Supreme Court of the United States

CLIFTON SANDIFER, *et al.*,

Petitioners,

v.

UNITED STATES STEEL CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

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January 5, 2010 District Court Opinion...Pet. App. 21a

October 15, 2009 District Court Opinion...Pet. App. 34a

June 11, 2012 Order Denying Rehearing En Banc.....Pet. App. 82a

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA

SELECTED DOCKET ENTRIES FOR CASE #: 2:07-cv-00443-RLM

Date	Docket No.	Description
12/27/2007	1	COMPLAINT against John Surma, United States Steel Corporation (Filing fee $ 350.) Receipt #2211159, filed by Bernard Jenkins, Alvin Mitchell, Marilyn Walton, Kenny Williams, Clifton Sandifer, Nicole Andrews, Dora Anderson, Herbert Harris. (Attachments: # 1 Civil Cover Sheet)(kjp) (Entered:)
12/27/2007	2	Summons Issued as to United States Steel Corporation. (kjp) (Entered:)
02/29/2008	15	ANSWER to 1 Complaint, by John Surma, United States Steel Corporation.(DiNardo, Lawrence) (Entered: 02/29/2008)
03/26/2008	28	(REFILED SEE DOCKET ENTRY 32) MOTION to Certify Class putative class certification and for issuance of notice by Plaintiff Clifton Sandifer. (Attachments: # 1 Exhibit Exhibit 1- List of current opt-in plaintiffs, # 2 Exhibit Exhibit 2, # 3

Exhibit Exhibit 3, # 4 Exhibit Exhibit 4, # 5 Exhibit Exhibit 5, # 6 Exhibit exhibit 6, # 7 Exhibit exhibit 7, # 8 Exhibit Exhibit 8, # 9 Exhibit Exhibit 9, # 10 Exhibit Exhibit 10, # 11 Exhibit Exhibit 11, # 12 Exhibit Exhibit 12, # 13 Exhibit Exhibit 13, # 14 Exhibit Exhibit 14, # 15 Exhibit Exhibit 15, # 16 Exhibit Exhibit 16, # 17 Exhibit Exhibit 17, # 18 Exhibit Exhibit 18, # 19 Exhibit Exhibit 19, # 20 Exhibit Exhibit 20, # 21 Exhibit Exhibit 21, # 22 Exhibit Exhibit 22, # 23 Exhibit Exhibit 23, # 24 Exhibit Exhibit 24, # 25 Exhibit Exhibit 25, # 26 Exhibit Exhibit 26, # 27 Exhibit Exhibit 27, # 28 Exhibit Exhibit 28, # 29 Exhibit Exhibit 29, # 30 Exhibit Exhibit 30, # 31 Exhibit Exhibit 31, # 32 Exhibit Exhibit 32, # 33 Exhibit Exhibit 33, # 34 Exhibit Exhibit 34, # 35 Exhibit Exhibit 35, # 36 Exhibit Exhibit 36 – Proposed Notice to Class, # 37 Appendix Proposed order granting putative class certification and notice)(Maduff, Aaron) Modified on 3/28/2008 to reflect refiled (rmn). Modified on 6/6/2008 by removing proposed order and forwarding it to chambers (mc). (Entered: 03/26/2008)

03/27/2008	31	Scheduled for Preliminary FRCP 16(b) Conference on 3/27/2008 before Magistrate Judge Paul R Cherry. Pla appeared by atty Aaron B Maduff, David L Kern teleph.Dft appeared by atty Lawrence C DiNardo, Rheanna T Guess, Terence M Austgen teleph. A preliminary hearing was held. The parties argued whether Plaintiffs' notice procedure (notice to potential future collective class Plaintiffs) should be promptly briefed and commence or should be stayed. The Court took the issues under advisement. The scheduled FRCP 16(b) Conferencve [sic] was not held and will be rescheduled at a later date. (Tape #FTR.) (smb) (Entered: 03/27/2008)
03/28/2008	34	ORDER re: 31 Preliminary Hearing and 32 MOTION forPutative Class Certification and For Issuance of Notice which is stayed until the Court issues its order on the summary judgment issues. The Court orders that the parties may immediately commence discovery, limited to the anticipated sum jdgmt issues. Dfts' motion for summary judgment to be filed by 4/30/2008. Signed by

		Magistrate Judge Paul R Cherry on 3/28/08. (kjp) (Entered: 03/30/2008)
05/30/2008	77	Consent MOTION for Extension of Time to File *Summary Judgment Pleadings* by Defendant United States Steel Corporation. (Austgen, Terence) (Entered: 05/30/2008)
05/30/2008	78	ORDER granting 77 Motion for Extension of Time to File. Dispositive motions to be filed by 6/2/2008. Signed by Magistrate Judge Paul R Cherry on 5/30/2008. (smb) (Entered: 05/30/2008)
06/02/2008	81	MOTION for Leave to File Memorandum of Law In Support of Defendant's Motion for Summary Judgment in Excess of Twenty-Five Pages by Defendant United States Steel Corporation. (Attachments: # 1 Exhibit A)(Jorgensen PHV, Brian) (Entered: 06/02/2008)
06/02/2008	82	MOTION for Summary Judgment by Defendant United States Steel Corporation. (Jorgensen PHV, Brian) (Entered: 06/02/2008)
06/02/2008	83	MEMORANDUM in Support of 82 MOTION for Summary Judgment filed by United States

		Steel Corporation. (Jorgensen PHV, Brian) (Entered: 06/02/2008)
06/02/2008	95	ORDER granting 92 Motion for Extension of Time to File Response.Pltf's Response to motion for summary judgment to be filed by 10/6/2008. Status hearing and scheduling conference set for 9/25/08 at 9:15AM before Magistrate Judge Cherry. Signed by Magistrate Judge Paul R Cherry on 6/30/08. (kjp) (Entered: 06/30/2008)
01/16/2009	131	MOTION for Leave to File *Plaintiffs Response to Defendant's Motion for Summary Judgment And Brief in Support in Excess of 25 Pages, Instanter* by Plaintiffs Bernard Jenkins, Alvin Mitchell, Marilyn Walton, Kenny Williams, Clifton Sandifer, Nicole Andrews, Dora Anderson, Herbert Harris. (Attachments: # 1 Exhibit A – Plaintiffs Response to Defendant's Motion for Summary Judgment And Brief in Support)(Maduff, Aaron) (Entered: 01/16/2009)
01/16/2009	132	(REFILED AS DE 135 DUE TO OMITTED SIGNATURE) RESPONSE in Opposition re 82 MOTION for Summary

		Judgment *And Brief in Support* filed by Bernard Jenkins, Alvin Mitchell, Marilyn Walton, Kenny Williams, Clifton Sandifer, Nicole Andrews, Dora Anderson, Herbert Harris. (Maduff, Aaron) Modified on 1/21/2009 (mc). (Entered: 01/16/2009)
01/20/2009	138	ORDER granting 131 Motion for Leave to File a Response in Excess of 25 Pages, Instanter. Pltfs are granted leave to file a response brief of 56 pgs in length. Signed by Magistrate Judge Paul R Cherry on 1/20/09. (kjp) (Entered: 01/21/2009)
10/15/2009	157	OPINION AND ORDER granting in part and denying in part 82 Motion for Summary Judgment. Signed by Judge Robert L Miller, Jr on 10/15/09. (kjp) (Entered: 10/19/2009)
10/30/2009	159	MOTION for Leave to Appeal (Interlocutory) Under Section 1292(b) and for Partial Reconsideration of Court's October 15, 2009 Order by Defendant United States Steel Corporation. (Jorgensen PHV, Brian) (Entered: 10/30/2009)

11/16/2009	172	ORDER granting 171 Motion for Extension of Time to File Response. Pltfs' Response to motion for reconsideration/certification for interlocutory appeal to be filed by 11/30/2009. Signed by Judge Robert L Miller, Jr on 11/16/09. (kjp) (Entered: 11/17/2009)
11/30/2009	181	BRIEF in Opposition to 159 MOTION for Leave to Appeal (Interlocutory) Under Section 1292(b) and for Partial Reconsideration of Court's October 15, 2009 Order filed by Bernard Jenkins, Alvin Mitchell, Marilyn Walton, Kenny Williams, Clifton Sandifer, Nicole Andrews, Dora Anderson, Herbert Harris. (Attachments: # 1 Exhibit A)(Maduff, Aaron) (Entered: 11/30/2009)
01/05/2010	192	OPINION AND ORDER granting in part and denying in part the defendants' 159 Motion: the request for reconsideration is DENIED and the request for certification of interlocutory appeal is GRANTED. Signed by Judge Robert L Miller, Jr on 1/5/10. (sda) (Modified BY ADDING THE WORD OPINION IN TEXT on 1/5/2010) (sda). (Entered: 01/05/2010)

04/07/2010	210	NOTICE OF CROSSAPPEAL as to 157 Order on Motion for Summary Judgment by Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins, Alvin Mitchell, Clifton Sandifer, Marilyn Walton, Kenny Williams. (Maduff, Aaron) (Entered: 04/07/2010)
04/12/2010	214	USCA Case Number 10-1866 for 210 Notice of Cross Appeal filed by Herbert Harris, Kenny Williams, Dora Anderson, Marilyn Walton, Clifton Sandifer, Nicole Andrews, Bernard Jenkins, Alvin Mitchell. (kjp) (Entered: 04/13/2010)
06/19/2010	232	MANDATE of USCA – The USCA resolves the specific issue that they have been asked to resolve in the interlocutory appeal IN FAVOR of US STEEL. On the basis of that resolution, the suit has no merit and should be dismissed by the district court. Returned to the district court, one box of exhibits, which will be housed in the Clerk's vault until the conclusion of232 this case. (Attachments: # 1 Certified Opinion and Order, # 2 Bill of Costs)(kjp) Dkt text modified on 6/25/2012 (kjp). (Entered: 06/22/2012)

06/19/2010	233	USCA Certified FINAL JUDGMENT as to 210 Notice of Cross Appeal filed by Herbert Harris, Kenny Williams, Dora Anderson, Marilyn Walton, Clifton Sandifer, Nicole Andrews, Bernard Jenkins, Alvin Mitchell and 208 Notice of Interlocutory Appeal filed by United States Steel Corporation (kjp) (Entered: 06/22/2012)
06/27/2012	235	ORDER DISMISSING CASE In accordance with the May 8, 2012 appellate decision in this case, the court ORDERS this action DISMISSED. Signed by Judge Robert L Miller, Jr on 6/27/12. (kjp) (Entered: 06/27/2012)
06/27/2012	236	CLERK'S ENTRY OF JUDGMENT. (kjp) (Entered: 06/27/2012)
03/04/2013	237	USCA Record for Certiorari Transmittal Form re 210 Notice of Cross Appeal and 208 Notice of Interlocutory Appeal. The District Court to transmit 1 box of exhibits to the Supreme Court. (kjp) (Entered: 03/05/2013)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SELECTED DOCKET ENTRIES FOR CASE #10-8001 (INTERLOCUTORY PETITION)

Date	Docket No.	Description
01/15/2010	1	Petition for Permission to appeal pursuant to 28 U.S.C. 1292(b) docketed. [1] [10-8001] (FP)
03/25/2010	6	ORDER: 1. United States Steet [sic] Corporation's petition for leave to appeal pursuant to 28 U.S.C. 1292(b), filed on 1/15/10. 2. Plaintiffs-respondents brief in response to Unitd [sic] States Steel Corporation's petition for leave to appeal pursuant to 28 U.S.C. 1292(b), filed on 2/22/10. #1 is GRANTED. Petitioner shall pay the required appellate fees to the clerk of the district court within 14 days from the entry of this order, pursuant to FRAP 5(d)(1). Once the district court notifies this court that the fees have been paid, the appeal will be entered on this court's general docket. The Department of Labor is invited to file a brief as amicus curiae. Any amicus brief must comply with the timing requirements of FRAP 29. [1] Kenneth F. Ripple,

Circuit Judge; Daniel A. Manion, Circuit Judge and Terence T. Evans, Circuit Judge. [6208355] [10-8001] (FP)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SELECTED DOCKET ENTRIES FOR CASE #10-1821 (INTERLOCUTORY APPEAL)

Date	Docket No.	Description
07/13/2010	6	Motion filed by Appellants Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer in 10-1866 to consolidate this case with 10-1821. [6] [6235708] [10-1866, 10-1821] (JLC)
07/13/2010	7	Motion filed by Appellees Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer in 10-1821 to consolidate this case with 10-1866. [7] [6235878] [10-1821, 10-1866] (JLC)
07/14/2010	8	Amended motion filed by Appellees Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer in 10-1821 to consolidate this case with 10-1866. [8] [6236084] [10-1821, 10-1866] (SM)
07/14/2010	10	Amended motion filed by Appellants Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer in 10-1866 to

		consolidate this appeal with 10-1821. [10] [6236157] [10-1866, 10-1821] (JLC)
07/15/2010	9	ORDER: Defendant and amicus curiae shall file, on or before July 23, 2010, a response to the plaintiffs' motion to consolidate. DW [9] [6236142] [10-1821] (AM)
08/02/2010	14	ORDER re: Amended Plaintiff-appellees' Motion to Consolidate Appeal 10-1866 with this Appeal 10-1821, United States Steel Corporation's Response to Amended Plaintiff-appellees' Motion to Consolidate Appeals No. 10-1866 and 10-1821, Secretary of Labor's Response to Plaintiff-appellees' Motion to Consolidate Appeal No. 10-1821 with Appeal No. 10-1866 in their respective briefs. DW [14] [6240672] [10-1821, 10-1866] (AD)
11/07/2011	36	Motion filed by Amicus Curiae Secretary of Labor to extend time to consider and potentially file ~~agency 1~~ a brief as amicus curiae. [6351041] [10-1821, 10-1866] – [Edited 11/08/2011 by JLC to reflect type of brief potentially sought to be filed is

		for the Secretary of Labor as amicus curiae.] (Patel, Seema)
11/07/2011	37	Submitted appellee/cross-appellant brief by Aaron B. Maduff for Appellees Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer in 10-1821, Appellants Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer in 10-1866. [37] [6351058] [10-1821, 10-1866] (Maduff, Aaron)
11/08/2011	38	Appellee Cross-Appellant brief filed by Appellees Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer in 10-1821, Appellants Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer in 10-1866.. Paper copies due on 11/15/2011. [6351272] Electronically Transmitted. [10-1821, 10-1866] (GW)
11/14/2011	42	ORDER: 1. Secretary of Labor's motion for extension of time to consider and potentially file a brief as amicus curiae, filed on 11/7/11. 2. Plaintiff-appellees/ Cross-Appellants' motion for leave to file an amended combined response and opening

		brief, (filed on November 7, 2011), instanter, filed on 11/9/11. #1 is GRANTED. The court extends the deadline for the Secretary of Labor to file an amicus brief to November 21, 2011. #2 is GRANTED to the extent that appellees may file an amended brief by no later than November 15, 2011. The brief should be the same as that tendered with the motion on November 9, 2011, save that appellees must move the standard of review from the beginning of the brief to the beginning of the argument. See Fed. R. App. P. 28(a)(9)(B). No other changes are allowed. [41] [36] AIN [6352318] [10-1821, 10-1866] (FP)
11/14/2011	43	Filed Non-Party Motion of United Food and Commercial Workers International Union for Leave to File Amicus Curiae Brief by United Food and Commercial Workers International Union. [6352503] [10-1821, 10-1866] – [Edited 11/15/2011 by AB – This is a Scanned PDF; a Native PDF must be submitted.] (Major, Ruth)

11/16/2011	46	Filed Non-Party Amended Motion of United Food And Commercialworkers International Union For Leave to File Amended Amicus Curiae Brief by United Food and Commercialworkers International Union. [6353091] [10-1821, 10-1866] – [Edited 11/17/2011 by AB – this native PDF motion and tendered brief corrects docket #43.] (Major, Ruth)
11/17/2011	47	ORDER: 1. Motion of United Food and Commercial Workers International Union for leave to file amicus curiae brief, filed on 11/14/11. 2. Amended motion of United Food and Commercial Workers International Union for leave to file amended amicus curiae brief, filed on 11/16/11. The motion [sic] are DENIED. [43] [46] AIN [6353358] [10-1821, 10-1866] (FP)
11/18/2011	50	Submitted brief by Seema N. Patel for Amicus Curiae LABR (Secretary of Labor) in 10-1821. Federal or state filer (consent unnecessary). [50] [6353705] [10-1821, 10-1866] (Patel, Seema)
11/18/2011	51	Amicus brief filed by Amicus Curiae Secretary of Labor in 10-1821, 10-1866 government filing,

		no consent necessary. Paper copies due on 11/28/2011. Electronically Transmitted. [6353771] [10-1821, 10-1866] (RS)
01/06/2012	58	Argument set for Wednesday, February 15, 2012, at 9:30 am. in the Main Courtroom, Room 2721. Each side limited to 20 minutes. [58] [6364105] [10-1821, 10-1866] (SK)
01/30/2012	64	Motion filed by Amicus Curiae Secretary of Labor in 10-1821, 10-1866 to participate in oral argument. [6370335] [10-1821, 10-1866] (Patel, Seema)
01/31/2012	65	Order issued GRANTING motion to participate in oral argument as amicus curiae. The Secretary of Labor may participate in argument, using time ceded from plaintiffs-appellees. No additional time will be allowed. [64] AIN [6370659] [10-1821, 10-1866] (ER)
02/15/2012	67	Case heard and taken under advisement by panel: Richard A. Posner, Circuit Judge; Joel M. Flaum, Circuit Judge and Daniel A. Manion, Circuit Judge. [67] [6374482] [10-1821, 10-1866] (RT)

02/15/2012	68	Case argued by Ms. Seema Newton Patel for Amicus Curiae Secretary of Labor, Lawrence C. DiNardo for Appellant United States Steel Corporation and Mr. Aaron Benjamin Maduff for Appellees Clifton Sandifer, Nicole Andrews, Dora Anderson, Herbert Harris and Bernard Jenkins in 10-1821, Ms. Seema Newton Patel for Amicus Curiae Secretary of Labor, Mr. Aaron Benjamin Maduff for Appellants Clifton Sandifer, Nicole Andrews, Dora Anderson, Herbert Harris and Bernard Jenkins and Lawrence C. DiNardo for Appellee United States Steel Corporation in 10-1866. [68] [6374484] [10-1821, 10-1866] (RT)
05/08/2012	69	Filed opinion of the court by Judge Posner. The plaintiffs did not ask either the district judge or us for leave to appeal. So we hereby dismiss the cross-appeal. The specific issue that we have been asked to resolve in this interlocutory appeal is resolved in favor of U.S. Steel. On the basis of that resolution, the suit has no merit and should be dismissed by the district court. This opinion has been circulated to the full court in advance of publication. 7th Cir. R. 40(e).

		None of the judges in regular active service voted to hear the case en banc. (Judge Williams did not participate in the Rule 40(e) consideration of the matter.) (See opinion for further details) Richard A. Posner, Circuit Judge; Joel M. Flaum, Circuit Judge and Daniel A. Manion, Circuit Judge. [69] [6396016] [10-1821, 10-1866] (AM)
05/08/2012	70	ORDER: Final judgment filed per opinion. With costs: yes. [70] [6396022] [10-1821, 10-1866] (AM)
05/22/2012	73	Filed Petition for Rehearing and Petition for Rehearing Enbanc by Appellees Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer in 10-1821, Appellants Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer in 10-1866. [73] [6399996] Paper copies due on 05/25/2012 [10-1821, 10-1866] (RT)
06/11/2012	75	ORDER: Appellees Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer in 10-1821, Appellants Dora Anderson, Nicole Andrews,

Herbert Harris, Bernard Jenkins and Clifton Sandifer in 10-1866 Petition for Rehearing and Petition for Rehearing Enbanc is DENIED. [6406707][75] [10-1821, 10-1866] (KH)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SELECTED DOCKET ENTRIES FOR CASE #10-1866 (PLAINTIFFS' CROSS-APPEAL)

Date	Docket No.	Description
04/12/10	1	Private civil case docketed. Fee paid. Docketing statement filed. Transcript information sheet due by 04/26/2010. Appellant's brief due on or before 05/24/2010 for Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer. [1] [10-1866] (MAN)
04/13/10	2	ORDER: Appellants Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer shall file a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. Briefing is SUSPENDED pending further court order. (See order for further details) [6212850] DW Jurisdictional memorandum due for Appellant Dora Anderson, Appellant Nicole Andrews, Appellant Herbert Harris, Appellant Bernard Jenkins and Appellant Clifton Sandifer by 04/26/2010 [10-1866]

04/26/10	3	Filed Appellants Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer Memorandum of jurisdiction pursuant to the court's order of April 13, 2010. [2] [6216681] [3] [10-1866] (FP)
07/13/10	8	Motion filed by Appellees Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer in 10-1821 to consolidate this case with 10-1866. [8] [6235878] [10-1821, 10-1866] (JLC)
07/14/10	10	Amended motion filed by Appellants Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer in 10-1866 to consolidate this appeal with 10-1821. [10] [6236157] [10-1866, 10-1821] (JLC)
08/02/10	13	ORDER re: Plaintiff-appellants' Memorandum of Jurisdiction Pursuant to the Court's Order of April 13, 2010 and United States Steel Corporation's Response to Plaintiffs' Memorandum Addressing the Jurisdictional Issue Raised in the Court's Order of April 13, 2010. This appeal shall proceed to briefing. Further, however, that the parties fully address the issue of

		appellate jurisdiction over this appeal (10-1866) in their respective briefs. Briefing will be set by separate order. [13] DW [6240644] [10-1866] (AD)
08/02/10	14	ORDER re: Amended Plaintiff-appellees' Motion to Consolidate Appeal 10-1866 with this Appeal 10-1821, United States Steel Corporation's Response to Amended Plaintiff-appellees' Motion to Consolidate Appeals No. 10-1866 and 10-1821, Secretary of Labor's Response to Plaintiff-appellees' Motion to Consolidate Appeal No. 10-1821 with Appeal No. 10-1866 and Plaintiffs-appellees' Reply to United States Steel's Response to Plaintiffs-appellees' Motion to Consolidate Appeal 10-1866 with Appeal 10-1821. The motion to consolidate is GRANTED and these appeals are CONSOLIDATED for purposes of briefing and disposition. Briefing, however, remains SUSPENDED pursuant to the court's order of June 30, 2010. Counsel for the parties are reminded that they must fully address the issue of appellate jurisdiction of Appeal No. 10-1866 in their respective

		briefs. DW [14] [6240672] [10-1821, 10-1866] (AD)
09/12/11	34	Order issued GRANTING motion to extend time to file appellee, cross-appellant brief. [33] Appellee Cross-Appellant brief due on or before 11/07/2011 for Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer. Appellant Reply Cross-Appellee brief due by 12/07/2011 for Appellee United States Steel Corporation. Reply Brief in Cross Appeal due on or before 12/21/2011 for Appellees Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins, Clifton Sandifer. CMD [34] [6336720] [10-1821, 10-1866] (CD)
11/07/2011	37	Motion filed by Amicus Curiae Secretary of Labor to extend time to consider and potentially file ~~agency 1~~ a brief as amicus curiae. [6351041] [10-1821, 10-1866] – [Edited 11/08/2011 by JLC to reflect type of brief potentially sought to be filed is for the Secretary of Labor as amicus curiae.] (Patel, Seema)
11/14/2011	43	ORDER: 1. Secretary of Labor's motion for extension of time to consider and potentially file a

		brief as amicus curiae, filed on 11/7/11. 2. Plaintiff-appellees/ Cross-Appellants' motion for leave to file an amended combined response and opening brief, (filed on November 7, 2011), instanter, filed on 11/9/11. #1 is GRANTED. The court extends the deadline for the Secretary of Labor to file an amicus brief to November 21, 2011. #2 is GRANTED to the extent that appellees may file an amended brief by no later than November 15, 2011. The brief should be the same as that tendered with the motion on November 9, 2011, save that appellees must move the standard of review from the beginning of the brief to the beginning of the argument. See Fed. R. App. P. 28(a)(9)(B). No other changes are allowed. [42] [37] AIN [6352318] [10-1821, 10-1866] (FP)
11/14/2011	44	Filed Non-Party Motion of United Food and Commercial Workers International Union for Leave to File Amicus Curiae Brief by United Food and Commercial Workers International Union. [6352503] [10-1821, 10-1866] – [Edited 11/15/2011 by AB – This is a Scanned PDF;

		a Native PDF must be submitted.] (Major, Ruth)
11/16/2011	47	Filed Non-Party Amended Motion of United Food And Commercialworkers International Union For Leave to File Amended Amicus Curiae Brief by United Food and Commercialworkers International Union. [6353091] [10-1821, 10-1866] – [Edited 11/17/2011 by AB – this native PDF motion and tendered brief corrects docket #43.] (Major, Ruth)
11/17/2011	48	ORDER: 1. Motion of United Food and Commercial Workers International Union for leave to file amicus curiae brief, filed on 11/14/11. 2. Amended motion of United Food and Commercial Workers International Union for leave to file amended amicus curiae brief, filed on 11/16/11. The motion [sic] are DENIED. [44] [47] AIN [6353358] [10-1821, 10-1866] (FP)
11/18/2011	51	Submitted brief by Seema N. Patel for Amicus Curiae LABR (Secretary of Labor) in 10-1821. Federal or state filer (consent unnecessary). [51] [6353705] [10-1821, 10-1866] (Patel, Seema)

11/18/2011	52	Amicus brief filed by Amicus Curiae Secretary of Labor in 10-1821, 10-1866 government filing, no consent necessary. Paper copies due on 11/28/2011. Electronically Transmitted. [6353771] [10-1821, 10-1866] (RS)
01/30/2012	65	Motion filed by Amicus Curiae Secretary of Labor in 10-1821, 10-1866 to participate in oral argument. [6370335] [10-1821, 10-1866] (Patel, Seema)
01/31/2012	66	Order issued GRANTING motion to participate in oral argument as amicus curiae. The Secretary of Labor may participate in argument, using time ceded from plaintiffs-appellees. No additional time will be allowed. [65] AIN [6370659] [10-1821, 10-1866] (ER)
02/15/2012	68	Case heard and taken under advisement by panel: Richard A. Posner, Circuit Judge; Joel M. Flaum, Circuit Judge and Daniel A. Manion, Circuit Judge. [68] [6374482] [10-1821, 10-1866] (RT)
02/15/2012	69	Case argued by Ms. Seema Newton Patel for Amicus Curiae Secretary of Labor, Lawrence C. DiNardo for Appellant United States Steel Corporation and

		Mr. Aaron Benjamin Maduff for Appellees Clifton Sandifer, Nicole Andrews, Dora Anderson, Herbert Harris and Bernard Jenkins in 10-1821, Ms. Seema Newton Patel for Amicus Curiae Secretary of Labor, Mr. Aaron Benjamin Maduff for Appellants Clifton Sandifer, Nicole Andrews, Dora Anderson, Herbert Harris and Bernard Jenkins and Lawrence C. DiNardo for Appellee United States Steel Corporation in 10-1866. [69] [6374484] [10-1821, 10-1866] (RT)
05/08/2012	70	Filed opinion of the court by Judge Posner. The plaintiffs did not ask either the district judge or us for leave to appeal. So we hereby dismiss the cross-appeal. The specific issue that we have been asked to resolve in this interlocutory appeal is resolved in favor of U.S. Steel. On the basis of that resolution, the suit has no merit and should be dismissed by the district court. This opinion has been circulated to the full court in advance of publication. 7th Cir. R. 40(e). None of the judges in regular active service voted to hear the case en banc. (Judge Williams did not participate in the Rule 40(e) consideration of the

		matter.) (See opinion for further details) Richard A. Posner, Circuit Judge; Joel M. Flaum, Circuit Judge and Daniel A. Manion, Circuit Judge. [70] [6396016] [10-1821, 10-1866] (AM)
05/08/2012	71	ORDER: Final judgment filed per opinion. With costs: yes. [71] [6396022] [10-1821, 10-1866] (AM)
05/22/2012	74	Filed Petition for Rehearing and Petition for Rehearing Enbanc by Appellees Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer in 10-1821, Appellants Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer in 10-1866. [74] [6399996] Paper copies due on 05/25/2012 [10-1821, 10-1866] (RT)
06/11/2012	76	ORDER: Appellees Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer in 10-1821, Appellants Dora Anderson, Nicole Andrews, Herbert Harris, Bernard Jenkins and Clifton Sandifer in 10-1866 Petition for Rehearing and Petition for Rehearing Enbanc is DENIED.

[6404707][76] [10-1821, 10-1866]
(KH)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

Clifton Sandifer, et al,	)	
Plaintiffs,	)	
vs.	)	Cause No.: 2:07 CV 00443
John Surma, et al, [USS]	)	
Defendants.	)	

COMPLAINT

(Filed Dec. 21, 2007)

NOW COME Clifton Sandifer, et al, Plaintiffs, and file this Original Complaint complaining against John Surma, et al, Defendants, and for their causes of action would respectfully show the Court as follows:

I.

1. This Court has jurisdiction over Plaintiffs' claims against Defendants pursuant to 29 U.S.C. § 216(b), and 28 U.S.C. §§ 1331 and 1337.

II.

2. Plaintiffs, Clifton Sandifer, et al, are current or former employees of Defendants and are employees as defined in 29 U.S.C. §203(2)(C).

III.

3. Defendants, John Surma, et al, are subject to the jurisdiction of this Court pursuant to 29 U.S.C. §203(d).

IV. INTRODUCTION

4. Plaintiffs Clifton Sandifer, et al, and similarly situated individuals, are current or former employees of Defendant, United States Steel Corporation ("USS"), and are employees as defined in 29 U.S.C. §203(2)(C). Plaintiffs bring claims individually and as part of a collective action under 29 U.S.C. § 216(b) on behalf of other similarly situated individuals currently or formerly employed by USS. The collective action claims are for overtime compensation, liquidated damages (or alternatively interest), and attorneys' fees and costs, under 29 U.S.C. §§ 207, 216(b).

V. PARTIES

5. Plaintiffs reside in the states of Illinois and Indiana. *See* Exhibit "A" incorporated herein by reference. Consent forms for each of these Plaintiffs, as required by 29 U.S.C. § 216(b), are attached hereto as Group Exhibit "B" and are incorporated herein by reference. Plaintiffs work, or have worked, numerous pre-shift, post-shift, and other hours in excess of forty (40) hours per week, for which they have not received proper overtime compensation. Defendant USS also has not provided Plaintiffs with an itemized statement of total hours worked with each payment of

wages and has not maintained records of all hours worked as required by the FLSA.

6. Defendant John Surma is sued in his official capacity as the Chairman and CEO of USS and not as an individual. Defendant USS is a Delaware corporation headquartered at 600 Grant Street, Pittsburgh, Pennsylvania 15219. USS operates numerous steel mills in Indiana, Alabama, Illinois, Michigan, Ohio, Minnesota and Pennsylvania and employs, or has employed, Plaintiffs and many thousands of similarly situated persons throughout the United States.

VI. FACTUAL BACKGROUND

7. Since at least December 2004, Defendant USS has operated steel mills in the locations indicated above, and has employed Plaintiffs and thousands of similarly situated individuals at these facilities.

8. Plaintiffs and similarly situated individuals are required by USS to report to work before their paid shifts begin, to don protective clothing and safety equipment before their paid shifts begin, to travel to the assigned work location within the mill after donning and before their paid shifts begin, to spend significant amounts of time working during meal breaks, to travel from the assigned work location within the mill before doffing, but after their paid shifts end, to doff protective clothing and safety equipment at the work site after their paid shifts, to shower at the work site after their paid shifts, and to launder contaminated clothing while off duty and

without pay. This unpaid pre-shift, donning, travel, doffing, shower, and other unpaid time accounts for at least 5 hours of unpaid work per week by each Plaintiff and similarly situated individuals.

9. USS also fails to make and keep records of all of the hours worked by Plaintiffs as required by the FLSA.

10. Upon information and belief these unlawful pay practices of USS are consistent for Plaintiffs and all similarly situated persons employed by USS throughout the United States.

11. Plaintiffs and similarly situated current and former USS employees are covered by the FLSA which requires employers to pay employees one-and-one-half times their normal hourly rate for hours worked in excess of forty (40) hours per week.

12. Defendant USS has required Plaintiffs and similarly situated individuals to regularly work "off-the-clock" hours in excess of 40 hours per week without paying them the legally required overtime compensation.

13. Plaintiffs do not fall within any of the exemptions from the federal overtime requirements.

14. Defendants are aware of, encourage, and require the long hours worked by Plaintiffs and similarly situated individuals.

15. Defendants' denial of overtime compensation due to Plaintiffs and similarly situated individuals, is, and has been, willful and deliberate.

16. Defendant USS has also knowingly and intentionally failed to provide Plaintiffs and similarly situated individuals with an itemized statement of total hours worked with each payment of wages. Defendant USS has intentionally failed to maintain the required records of hours worked by Plaintiffs and similarly situated persons employed by USS.

VII. COLLECTIVE ACTION ALLEGATIONS

17. This action is maintainable as an "opt-in" collective action pursuant to 29 U.S.C. § 216(b) as to claims for overtime compensation, liquidated damages (or, alternatively, interest), and attorneys' fees under the FLSA. In addition to Plaintiffs, numerous current and former individuals are similarly situated to Plaintiffs with regard to their wages and claims for unpaid wages and damages, in that they have been denied proper overtime compensation by USS in the three (3) years prior to the filing of this Complaint. Plaintiffs are representative of those other current and former employees of USS and are acting on behalf of their interests as well as Plaintiffs' own interests in bringing this action. These similarly situated employees are known to Defendants and are readily identifiable, and may be located through Defendant USS' records. These similarly situated employees may readily be notified of this action, and

allowed to opt into it pursuant to 29 U.S.C. § 216(b), for the purpose of collectively adjudicating their claims for overtime compensation, liquidated damages (or, alternatively, interest), and attorneys' fees under the FLSA.

VIII. COLLECTIVE ACTION CLAIMS
DENIAL OF OVERTIME COMPENSATION
[29 U.S.C. §§ 207, 211(c), 216(b)]

18. Plaintiffs hereby incorporate by reference Paragraphs 1 through 17 above as though fully set forth herein.

19. Under the FLSA, 29 U.S.C. § 207, Defendants were and are obligated to compensate Plaintiffs and similarly situated employees for all hours worked in excess of forty (40) hours in a week. Overtime compensation must be paid at a rate not less than one and one-half times the regular rate of pay.

20. During the three years prior to the filing of this Complaint, Plaintiffs and similarly situated employees were regularly permitted, encouraged, and/or required to work in excess of forty (40) hours per week, but were not paid for such overtime work.

21. By failing to pay overtime compensation due to Plaintiffs and similarly situated employees, Defendants willfully, knowingly and/or recklessly violated the provisions of the FLSA, which require overtime compensation to be paid to non-exempt employees.

22. As a result of Defendant USS' policy and practice of withholding overtime compensation, Plaintiffs and similarly situated employees have been damaged in that they have not received wages due to them pursuant to the FLSA.

23. Defendant USS has made it difficult to account with precision for the unpaid overtime worked by Plaintiffs and similarly situated employees during the liability period, because it did not make, keep, and preserve records of all the hours worked by such employees as required for non-exempt employees by 29 U.S.C. § 211(c).

24. Defendant USS' failure to maintain and retain records of hours worked by Plaintiffs and similarly situated employees was willful and deliberate, and designed to serve its policy of unlawfully denying overtime compensation to Plaintiffs and similarly situated employees.

25. As a result of the unlawful acts of Defendants, Plaintiffs and similarly situated employees have been deprived of overtime compensation in amounts to be determined at trial, and are entitled to recovery of such amounts, as well as liquidated damages (or, alternatively, interest), attorneys' fees and costs pursuant to 29 U.S.C. § 216(b). Plaintiffs and other similarly situated persons employed or formerly employed by Defendants who may opt into this collective action pursuant to 29 U.S.C. § 216(b) request relief as described below.

IX. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request the following relief:

1. Authorization to issue notice pursuant to 29 U.S.C. § 216(b) at the earliest possible time to all current and former similarly situated employees of Defendant USS during the three (3) years immediately preceding the filing of this action, informing them that this action has been filed, of the nature of the action, and of their right to opt into this lawsuit if they worked hours in excess of forty (40) hours in a week during the past three (3) years, and were not paid overtime as required by the FLSA;

2. A declaratory judgment that Defendant USS has violated the overtime provisions of the FLSA, 29 U.S.C. § 207, as to the Plaintiffs and similarly situated persons who opt into this action;

3. A declaratory judgment that Defendants' violations of the FLSA were willful;

4. An award to Plaintiffs and other similarly situated persons who opt into this action of damages in the amount of unpaid overtime compensation to be proven at trial;

5. An award to Plaintiffs and other similarly situated persons who opt into this action of liquidated damages in an amount equal to the overtime compensation shown to be owed to them pursuant to 29 U.S.C. § 216(b); or, if liquidated damages are not

awarded, then in the alternative, prejudgment interest;

6. An award to Plaintiffs and other similarly situated persons who opt into this action of reasonable attorneys' fees and costs, pursuant to 29 U.S.C. § 216(b); and

7. An award of such other and further relief as this Court may deem appropriate.

Dated: December [21], 2007

Respectfully Submitted,

By:

/s/ Aaron B. Maduff

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Illinois Bar No. 6226935

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Illinois Bar No. 6198714

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Fax (915) 242-0000

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

Clifton Sandifer, et al, Plaintiffs, vs. John Surma, et al, Defendants.	Cause No.: 2:07-CV-0443 Judge

(Filed Dec. 21, 2007)

The Following is a list of Plaintiffs who are current and former employees of Defendant USS with[ ] their current states of residence. This list is incorporated into paragraph 5 of the Complaint.

[Plaintiffs:]

Clifton Sandifer, Indiana
Nicole Andrews, Indiana
Dora Anderson, Indiana
Herbert Harris, Indiana
Bernard Jenkins, Indiana
Alvin Mitchell, Indiana
Marilyn Walton, Indiana
Kenny Williams, Indiana

[Defendants:]

[John Surma and United States Steel Corporation]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

Clifton Sandifer, et al, Plaintiffs, vs. John Surma, et al, Defendants.	Cause No.: _____ Judge

Group Exhibit B to Complaint

The Following Consent Forms are attached to the Complaint.

FLSA CONSENT FORM

I, *(printed name)* Marilyn Walten, am a current or former employee of United States Steel Corporation ("USS"). I believe I am entitled to additional wages for the unpaid hours I have worked for USS in excess of forty hours per week. I wish to be included as a party in the pay claims being asserted by current and former USS employees against USS and related parties and entities. I hereby give consent to my attorneys, David L. Kern of KERN LAW FIRM PC, and Aaron B. Maduff of MADUFF & MADUFF LLC, or such other representatives as they may designate, to bring suit against USS on my behalf under the Fair Labor Standards Act in this action and in any

subsequent actions that they deem necessary to bring on my behalf.

/s/ Marilyn Walten _____ 12-16-07
Signature Date

Please Return this Consent Form to **Aaron B. Maduff**, Attorney at Law, MADUFF & MADUFF, LLC, One E. Wacker Drive, Suite 2122, Chicago, IL 60601, or to **David L. Kern**, Attorney at Law, KERN LAW FIRM PC, 1300 North El Paso, El Paso, Texas 79902. If you have any questions about the Consent Form, please call **Aaron B. Maduff** at 312-276-9000, or **David L. Kern** at (915) 542-1900.

FLSA CONSENT FORM

I, *(printed name)* Nicole Andrews, am a current or former employee of United States Steel Corporation ("USS"). I believe I am entitled to additional wages for the unpaid hours I have worked for USS in excess of forty hours per week. I wish to be included as a party in the pay claims being asserted by current and former USS employees against USS and related parties and entities. I hereby give consent to my attorneys, David L. Kern of KERN LAW FIRM PC, and Aaron B. Maduff of MADUFF & MADUFF LLC, or such other representatives as they may designate, to bring suit against USS on my behalf under the Fair Labor Standards Act in this action and in any

subsequent actions that they deem necessary to bring on my behalf.

/s/ Nicole Andrews _____ 12-16-07
Signature Date

Please Return this Consent Form to **Aaron B. Maduff**, Attorney at Law, MADUFF & MADUFF, LLC, One E. Wacker Drive, Suite 2122, Chicago, IL 60601, or to **David L. Kern**, Attorney at Law, KERN LAW FIRM PC, 1300 North El Paso, El Paso, Texas 79902. If you have any questions about the Consent Form, please call **Aaron B. Maduff** at 312-276-9000, or **David L. Kern** at (915) 542-1900.

FLSA CONSENT FORM

I, *(printed name)* Dora Anderson, am a current or former employee of United States Steel Corporation ("USS"). I believe I am entitled to additional wages for the unpaid hours I have worked for USS in excess of forty hours per week. I wish to be included as a party in the pay claims being asserted by current and former USS employees against USS and related parties and entities. I hereby give consent to my attorneys, David L. Kern of KERN LAW FIRM PC, and Aaron B. Maduff of MADUFF & MADUFF LLC, or such other representatives as they may designate, to bring suit against USS on my behalf under the Fair Labor Standards Act in this action and in any

subsequent actions that they deem necessary to bring on my behalf.

/s/ Dora Anderson _____ Dec. 16, 2007
Signature Date

Please Return this Consent Form to **Aaron B. Maduff**, Attorney at Law, MADUFF & MADUFF, LLC, One E. Wacker Drive, Suite 2122, Chicago, IL 60601, or to **David L. Kern**, Attorney at Law, KERN LAW FIRM PC, 1300 North El Paso, El Paso, Texas 79902. If you have any questions about the Consent Form, please call **Aaron B. Maduff** at 312-276-9000, or **David L. Kern** at (915) 542-1900.

FLSA CONSENT FORM

I, *(printed name)* Kenneth E. Williams, am a current or former employee of United States Steel Corporation ("USS"). I believe I am entitled to additional wages for the unpaid hours I have worked for USS in excess of forty hours per week. I wish to be included as a party in the pay claims being asserted by current and former USS employees against USS and related parties and entities. I hereby give consent to my attorneys, David L. Kern of KERN LAW FIRM PC, and Aaron B. Maduff of MADUFF & MADUFF LLC, or such other representatives as they may designate, to bring suit against USS on my behalf under the Fair Labor Standards Act in this action and in any

subsequent actions that they deem necessary to bring on my behalf.

/s/ Kenneth E. Williams — 12-14-07
Signature — Date

Please Return this Consent Form to **Aaron B. Maduff**, Attorney at Law, MADUFF & MADUFF, LLC, One E. Wacker Drive, Suite 2122, Chicago, IL 60601, or to **David L. Kern**, Attorney at Law, KERN LAW FIRM PC, 1300 North El Paso, El Paso, Texas 79902. If you have any questions about the Consent Form, please call **Aaron B. Maduff** at 312-276-9000, or **David L. Kern** at (915) 542-1900.

FLSA CONSENT FORM
(To Be Filed With The Court)

I (print name), Sandifer, Clifton Jr., am a current or former employee of United States Steel Corporation (the "Defendant"). I believe I am entitled to additional wages for the unpaid hours I have worked for the Defendant in excess of 40 hours per week. I wish to be a party in the pay claims being asserted by current or former employees of the Defendant against the Defendant and related parties and entities. I hereby give my consent to my attorneys, Aaron B. Maduff and Michael L. Maduff of the law firm of Maduff & Maduff, LLC, and David L. Kern of the Kern Law Firm, P.C., or such other persons or entities as they may designate, to bring suit against the Defendant on my behalf under the Fair

Labor Standards Act in this action and in any other or subsequent actions they may deem necessary or advisable.

/s/ Clifton Sandifer Jr. — 20 December 2007
Client's Signature — Date

FLSA CONSENT FORM
(To Be Filed With The Court)

I (print name), Alvin Mitchell, am a current or former employee of United States Steel Corporation (the "Defendant"). I believe I am entitled to additional wages for the unpaid hours I have worked for the Defendant in excess of 40 hours per week. I wish to be a party in the pay claims being asserted by current or former employees of the Defendant against the Defendant and related parties and entities. I hereby give my consent to my attorneys, Aaron B. Maduff and Michael L. Maduff of the law firm of Maduff & Maduff, LLC, and David L. Kern of the Kern Law Firm, P.C., or such other persons or entities as they may designate, to bring suit against the Defendant on my behalf under the Fair Labor Standards Act in this action and in any other or subsequent actions they may deem necessary or advisable.

/s/ Alvin Mitchell — 12-20-07
Client's Signature — Date

FLSA CONSENT FORM
(To Be Filed With The Court)

I (print name), Herbert H. Harris, am a current or former employee of United States Steel Corporation (the "Defendant"). I believe I am entitled to additional wages for the unpaid hours I have worked for the Defendant in excess of 40 hours per week. I wish to be a party in the pay claims being asserted by current or former employees of the Defendant against the Defendant and related parties and entities. I hereby give my consent to my attorneys, Aaron B. Maduff and Michael L. Maduff of the law firm of Maduff & Maduff, LLC, and David L. Kern of the Kern Law Firm, P.C., or such other persons or entities as they may designate, to bring suit against the Defendant on my behalf under the Fair Labor Standards Act in this action and in any other or subsequent actions they may deem necessary or advisable.

/s/ Herbert H. Harris — 12-20-07
Client's Signature — Date

FLSA CONSENT FORM
(To Be Filed With The Court)

I (print name), Bernard Jenkins Jr., am a current or former employee of United States Steel Corporation (the "Defendant"). I believe I am entitled to additional wages for the unpaid hours I have worked for the Defendant in excess of 40 hours per

week. I wish to be a party in the pay claims being asserted by current or former employees of the Defendant against the Defendant and related parties and entities. I hereby give my consent to my attorneys, Aaron B. Maduff and Michael L. Maduff of the law firm of Maduff & Maduff, LLC, and David L. Kern of the Kern Law Firm, P.C., or such other persons or entities as they may designate, to bring suit against the Defendant on my behalf under the Fair Labor Standards Act in this action and in any other or subsequent actions they may deem necessary or advisable.

/s/ Bernard Jenkins Jr.	12/20/07
Client's Signature	Date

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Clifton Sandifer, et al, Plaintiffs, vs. United States Steel Corporation, Defendant.	§ § § § § § § §	Case No. 2:07-cv-443 Judge Robert L. Miller Magistrate Judge Paul R. Cherry

DECLARATION OF CLIFTON SANDIFER

My name is Clifton Sandifer. I am over 21 years of age and fully competent to make this Declaration. I am giving this Declaration on my own free will and all statements contained herein are true and correct based upon my own personal knowledge.

General Background Information

1. I am a current employee of United States Steel Corporation ("USS") and am a plaintiff in the above captioned lawsuit. I have been employed with USS from September 1, 1977 until the present. I currently reside at P.O. Box 64555 Gary, IN 46401. During my employment at USS, I have worked as an Equipment Tender/Operating Technician II. My approximate hourly pay rate was $21.25 from May 20, 2003 to 3-31-04, 21.95 from 4-1-05 to 9-30-05, and $22.96 from 10-1-05 until August 6, 2006.

2. I was employed by Local Union No. 1066 as a Chairmen of the Civil Rights Committee from June, 2006 until September, 2008. In that capacity as a representative of the local union I became personally familiar with the grievance process, various complaints about USS by employees at Gary Works, as well as the business records produced by the Union and USS when a grievance is filed.

3. On a typical day, I work 8 to 12 hours per shift and typically work 24 to 32 hours of paid overtime per week. I have also worked many hours of unpaid overtime each week, for which I am claiming compensation in this lawsuit, as explained herein.

4. I am required to wear, over my regular clothes, the following personal protective equipment ("PPE"): flame retardant pants, flame retardant jackets, metatarsal shoes, steel toed work boots, hard hat, safety glasses, 100% cotton long sleeve shirt, gloves and ear plugs. The donning of this PPE is for safety purposes only and is required to complete my job at USS. None of this equipment may be used for purposes other than work related activities.

Pre and Post Shift Activities

5. USS required that I and other similar employees arrive at Gary Works before our official shift began each day to don personal protective equipment kept in lockers at work so that we arrived at our work stations by the beginning of our official shift or buddy punch. I personally know of a

number of employees at USS, including Kevin Abernathy, Carl Chambers, and Bob Berg, that have been docked for not swiping into the gate at least 12 minutes before their official shift begins. For example, in Grievance No. WGa-2008-0191 this issue was grieved. I have attached a copy of that Grievance to this Declaration as **Exhibit A**.

6. My supervisors require me to be at safety meetings, or at my work station, ready to begin work at the time my shift begins with all my PPE donned and secured. For example, this position was discussed in Local Issue No. U-60-1066-701 and Local Issue No. 1014-83-17 attached to this Declaration as **Exhibit B**. I was also given in August, 2006 an "Absentee/Tardy Policy" whereby employees were "expected to be on the job ready to work at the starting time." I have attached a copy that "Absentee/Tardy Policy" to this Declaration as **Exhibit C**.

7. Being ready to work when the shift began required me to report to work about 15 to 20 minutes early to complete the gate swipe, walk to the locker room, put on the PPE, and walk to the safety meeting or my work station.

8. My supervisors also had a policy of requiring my co-workers to stay at their work stations until their official shift was over and, as a result of that policy, I personally observed that my co-workers had to perform certain work related activities without pay after the official shift ended each day. These activities included: waiting for relief to arrive, walking from the work station to the locker room, taking off and storing PPE,

bagging up contaminated work clothing, showering, and changing into clean clothing.

9. Towards the end of my shift I walk from my work location to the nearest washhouse. At the washhouse I take off my chemically contaminated PPE, including my undershirt and longjohns, bag up my contaminated work clothing, take a shower, change into clean clothing and proceed home. It takes me about 30 minutes of unpaid time each day to perform these activities.

10. The pre-shift work I have performed and continue to perform accounts for about 1.7 hours of unpaid work per week. The post-shift work I have performed accounts for about 3 hours of unpaid work per week. USS has not paid me for this pre-shift and post-shift work.

Laundering Activities

11. In addition, USS required that I take home and launder my contaminated PPE. There are no laundering facilities at the work site that we were allowed to use and no working time was provided by USS to perform this work while we were being paid. We are provided instructions from USS on how to clean our Flame Retardant PPE, which requires employees to launder their contaminated PPE in a certain manner to reduce the risk of compromising the special flame retardant properties of the PPE. *See*, General Safety and Plant Conduct, attached to this Declaration as **Exhibit D**; Personal Protective Equipment, attached to this Declaration as **Exhibit E**. USS also gave us specific instructions

regarding the PPE we are required to wear underneath our flame retardant PPE. All PPE, including undergarments, must be made of cotton or wool. No synthetics or plastics are allowed because of the extreme heat. **Exs. D** and **E**.

12. The unpaid working time spent on laundering my contaminated PPE accounts for at least 1 hour of work per week for which I was not paid by USS at all. I have never been paid for this work.

13. I personally observed my co-workers changing into clean clothing after showering and taking home contaminated clothing in bags. I also observed my coworkers bringing back clean PPE and work clothing to change into after the work shifts. I know that my co-workers were not paid for laundering the contaminated PPE and work clothing after their paid shifts ended because we frequently discussed these matters and complained to each other about having to perform work without pay.

USS Safety Policy – Personal Protective Equipment

14. As a long-term and current employee of USS, I have personal and direct knowledge of the company's safety manuals and safety requirements. The 2003 Basic Labor Agreement ("BLA") provides for and establishes the basic health and safety measures in place at Gary Works. Notably "employees have the right to a safe and healthful workplace, . . . to adequate personal protective equipment, [and] to safety and health training". I have attached pertinent portions of the Basic

Labor Agreement, 2003 as **Exhibit F**, p. 43. The BLA requires the company to provide "effective protective equipment in good working order when required by law or regulation or when necessary to protect employees from injury or illness. Such equipment includes, but is not limited to, goggles, hard hats, safety glasses, hearing protectors, face shields, respirators, special-purpose gloves, protective clothing and harnesses." **Ex. F**, p. 46. USS is also required to provide training including "the purpose, use and limitations of the required personal protective equipment." **Ex. F**, p. 47.

15. Employees at USS are issued a General Plant Safety Rules ("GPSR") book, which includes safety rules and regulations at Gary Works that are an "absolute necessity." Each employee must "wear the protective equipment provided for the job you are assigned." The rules include a brief description of the types of PPE that may be required and specifically require the use of PPE to "insure a safe work environment and prevent accidents and injuries." Head, foot, and eye protection must be worn at all times throughout the Gary Works plant. Additional other forms of PPE may be required depending on the job being performed by the employee. Employees at USS were required to sign for, read and comply with the USS GPSR book that contains a section requiring "Personal Protective Equipment (PPE)" to be used by employees. I have attached true and correct copies of pertinent portions of the GPSR as **Exhibit D**. I am personally familiar with this document for the reasons stated above.

16. Employees at USS are issued a Code of Ethical Business Conduct, which outlines USS' standard of business care and priorities in the work environment that must be followed by employees. According to the USS Code of Ethical Business Conduct, safety is the principal core value of USS and every employee must "wear all required personal protective equipment at all times" to abide by the standard of safety outlined by USS. Employees are required to sign for, read and comply with the USS Code of Ethical Business Conduct. I have attached a true and correct copy of the USS Code of Ethical Business Conduct to this Declaration as **Exhibit G**. I am personally familiar with this document for the reasons stated above.

17. Employees are also required to acknowledge receipt of the USS GPSR booklet and USS Code of Ethical Business Conduct and abide by the rules and policies contained therein, including wearing our required PPE at all times. I have attached a true and correct copy of the acknowledgement that is signed by employees at USS to this Declaration as **Exhibit H**. I am personally familiar with this document for the reasons stated above. The safety rules discussed in this Declaration have been in effect from at least September 1, 1977 through the present.

18. New employee orientations require employees to watch a "PPE Safety Video" explaining the safety procedures, purpose and use of PPE while working at Gary Works. USS06-000152. There are also specific video trainings that are required to be watched that describe each type of PPE used to protect employees. I have attached to this

Declaration a copy of the orientation video training checklist provided by USS to employees as **Exhibit I**. I am personally familiar with this document for the reasons stated above.

19. During our initial training, my co-workers and I also received a "Personal Protective Equipment" booklet. In this booklet, USS details for each of its employees the purpose and scope of the PPE program. It says specifically that the "Personal Protective Equipment (PPE) Program was developed to provide protection to Gary Complex employees from safety and health hazards in the workplace." During this program, employees must complete a "Personal Protective Equipment Survey" to determine the appropriate PPE employees must wear to complete their job safely and in compliance with the USS Gary Works PPE Program. The PPE booklet also explains that USS will "develop and maintain a plantwide program" and "enforce the use of all designated PPE." The PPE booklet requires USS to provide continuous training to employees to ensure that the highest standard of safety is met in the workplace. This booklet also provides an in depth description of each piece of PPE and the hazards they are intended to protect employees from when they wear them in the workplace. I have attached a true and correct copy of the PPE booklet to this Declaration as **Exhibit E**. I am personally familiar with this document for the reasons stated above.

20. Each "shop" in Gary Works has shop specific rules and regulations that must be followed by employees working in that area at the Gary

Works plant. We employees in the 84 Hot Strip Mill receive additional rules and regulations that must be followed. These rules require each of us to wear all of our required PPE at all times while working.

21. USS has also established a "Safety and Industrial Hygiene" program, which is designed to provide each employee a healthy, safe workplace environment and to prevent accidents, injuries and illnesses. While working at USS I have been subjected to exposure monitoring pursuant to the "Safety and Industrial Hygiene" program continuously. The purpose of this monitoring program is to develop and insure all employees at USS are wearing the proper PPE. For example, I received an "Employee Exposure Notification" requiring me to wear additional PPE. I have attached a copy of the "Employee Exposure Notification" to this Declaration as **Exhibit J**. This program is an initiative for both management and employees at USS to actively maintain the highest standards of safety, training and accident prevention. It requires each employee to understand and know the rules and safety procedures, wear PPE at all times, and understand and accept that safety is a condition of employment. I have attached a true and correct copy of the most recent 2008 "Policy Manual," which has been in effect since April, 2004, to this Declaration as **Exhibit K**. I am personally familiar with this document for the reasons stated above.

22. Employees also receive continuous training memoranda from USS called "contacts." A contact is typically a type-written sheet that address a

number of safety concerns in the workplace and prevention, including the use of PPE. After receiving a contact an employee acknowledges receipt of the document and management maintains a record. An example of these contacts are 26 different "Hazcom" trainings dedicated to hazardous exposure and materials at Gary Works. These are provided to each employee via email, available online or distributed by shift managers to each employee at regularly scheduled safety meetings. The purpose of the "Hazcom" contacts is to provide employees with information about work hazards and ensure that employees are competent to protect themselves in the work environment from chemicals they are likely to be exposed to at Gary Works. For example, under Contact No. 9, "Corrosives," an employee's best protection is to "always use the appropriate personal protective equipment . . . " I personally received each of these contacts from USS management. I have attached true and correct copies of the "Hazcom Safety Training Contacts" to this Declaration as **Exhibit L**. I am personally familiar with these documents for the reasons stated above.

23. USS claims that its "primary core value" in the workplace environment is safety. **Ex. G**. The safety rules require me and other employees to wear the PPE described above. The safety manuals state that employees must wear company approved hard hats, company approved safety glasses with side shields or other approved eye protection, company approved safety shoes or boots, company approved hearing protection devices such as approved earplugs or muffs, and

company approved flame retardant protective jackets and pants. Respirators, leggings, snoods, wristlets, gloves and face shields are also required depending on the work being performed. **Exs. D, E, F, G, K**. In fact, USS produces "Safe Job Procedures" ("SJP") for most of the jobs performed at Gary Works from changing the water on a water cooler to reconditioning coil in the Hot Strip Mill. The first requirement of every SJP regards use of the appropriate "protective clothing." For example, a number of SJP's in the 84 Hot Strip Mill require the use of varying types of PPE including flame retardant PPE, attached to this Declaration as **Exhibit M**.

24. I was aware of toxic chemicals in the workplace at USS because the company's Hazcom Contact No. 2 – No. 4 required me and my co-workers to be "provided information and training ***prior*** to [an] initial assignment to work with hazardous chemicals and whenever the hazards change." **Ex. L**. USS also provides this information to employees through an online Material Safety Data Sheets ("MSDS") database. **Ex. L**. [The "Hazcom" contacts also contain many references to the dangerous chemicals in the workplace and the required protections against exposure to those chemicals. *See*, **Ex. L**, Hazcom Contacts No. 6-26.

25. USS furthers its safety policy by disciplining employees if they fail to wear the required PPE. have personally seen USS discipline employees for not wearing safety goggles and other PPE including flame retardant clothing. This discipline may include a verbal warning, a written reprimand, suspension and even termination. For

example, I have attached to this Declaration as **Exhibit N**, the following 19 grievances, warnings and discipline notices rendered as a result of not wearing the appropriate PPE at Gary Works.

WGa-2008-0310

WGa-2006-0503

WGa-2005-0610

WGa-2005-0345

WGa-2004-0494

WGa-2003-0633

WGa-2002-0960

WGa-2002-0275

WGa-1996-0181

WGa-1993-0127

WGa-1991-0922

WGa-1991-0707

WGa-1990-2337

WGa-1990-1861

WGa-1990-0585

WGa-1989-0861

WGa-1988-1642

Discipline Notice of October 4, 2005 to Nicole Andrews

Written Warning of March 5, 1993 to Alvin Mitchell

Similarly Situated Employees

26. Plaintiffs were, and are, represented by the United Steelworkers' Union (the union), and collective bargaining agreements (CBAs) negotiated between the union and Defendant govern certain aspects of their compensation. The CBA, which governed compensation at the time this suit was filed, did not address compensation for the activities at issue in this case. Nor was the issue discussed during the negotiations leading to that contract. In addition, the CBA declared that its express terms constituted the "full and complete understanding" between the parties, excluding the possibility that compensation for the disputed time was governed by any unwritten contract between the employer and the union.

27. USS did not keep track of the unpaid working time I have described above and the unpaid time never appeared on my time or pay records. None of my supervisors ever recorded the unpaid time.

28. I also personally observed on many occasions that my coworkers, like me, worked unrecorded and unpaid time. I also know that my co-workers had the same difficulties as I in getting all of their working time recorded and paid for because we sometimes discussed these matters and complained to each other about the fact that we were being required to perform unrecorded work without pay.

29. For the reasons I have explained above, I know from my own personal observations that the pay practices I have described above were the same for my coworkers employed by USS at the Gary Works Plant in Gary, IN, during the time period that I have worked at USS, through the present.

30. I have performed and continue to perform unpaid work as described above with the full knowledge and approval of my supervisors at USS and pursuant to the company's Safety policies as personally observed and detailed above.

31. I have reviewed the foregoing Declaration and hereby affirm under penalty of perjury that all of the statements contained above are true and correct based upon my own personal knowledge.

C. Sandifer Jr.	1-4-09
Clifton Sandifer	Date

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA

CLIFTON SANDIFER, NICOLE ANDREWS, DORA ANDERSON, HERBERT HARRIS, BERNARD SANDIFER, ALVIN MITCHELL, MARILYN WALTON, AND KENNY WILLIAMS,	)	Case No. 2:07-cv-00443-RLM-PRC
Plaintiffs,	)	Honorable Robert L. Miller, Jr.
v.	)	
JOHN SURMA AND UNITED STATES STEEL CORPORATION	)	
Defendants.	)	

DECLARATION OF KEITH A. KOLB

1. My name is Keith A. Kolb. I am over 21 years of age and am competent to make this declaration. This declaration is based upon my personal knowledge and is true and correct.

2. I have been employed by U. S. Steel for over 38 years and, during that time, I have held various positions in the employee relations organization at four different U. S. Steel facilities. I have spent over 30 years of my career with U. S. Steel at Gary Works, where I have held the positions of Department Manager-Human Resource Services, Department

Manager-Labor Relations, and, since September 1, 2005, I have been Manager of Employee Relations for all of U. S. Steel's Gary Works.

3. As Manager of Employee Relations, I am responsible for leading a staff of 47 management and non-union, non-exempt employees and 76 union-represented employees. In addition to all employee relations matters, I am also responsible for Security and Emergency Services, Labor Relations, Organization Planning, Compensation Administration, Personnel Administration, Medical Services, and Community Affairs.

4. As Manager of Employee Relations at U. S. Steel's Gary Works, I have become familiar with the operation of the facilities at Gary Works and of the various rules, customs, practices, agreements, and local working conditions that govern or describe U. S. Steel's relationships with it's union-represented work force at Gary.

I. GARY WORKS

5. Gary Works is an integrated steel plant spread across nearly 3,000 acres located in Gary, Indiana.

6. Gary Works employs approximately 5,000 production and maintenance personnel in its steel operations, including 435 individuals at its coke plant.

7. Gary Works is a flat rolled steel plant and, as such, makes a variety of hot rolled and cold rolled steel products, zinc coated products and tin coated products.

8. Gary Works currently has 57 production units (depai tments [sic]) and the plant is divided into two major areas – the "East Side," also known as the 'primary side" where steel is made and the "West Side," where the steel is finished, that is, made into products for sale to customers.

9. On the East Side, Gary's four (4) blast furnaces, which have a production capability of in excess of 19,000 tons per day or 7.5 million tons per year, supply hot metal to two basic oxygen-process steelmaking shops with a total raw steel annual capacity of more than 8.0 million tons. To support the iron making process, the Gary Coke Plant, which includes three (3) operable coke batteries, is also located on the East Side of Gary Works and has potential capability of producing 3,200 tons per day or 2.1 million tons of coke annually.

10. In the production process at Gary, liquid steel from the six steelmaking vessels is directed to Gary's four (4) continuous slab casters. Once the slabs are cast, they are transported to the West Side of the plant, *i.e.*, the finishing side, where they are finished into hot rolled, cold rolled, or coated steel products

11. The main finishing facilities on the West Side of the plant include the following:

a. **Hot Strip Mill.** In the 84-inch Hot Strip Mill, cast slabs (which are 9.1" thick with lengths up to 40') are reheated to as much as 2,350 degrees Fahrenheit and ultimately reduced to a strip as thin as .070". The entire operation in the Hot Strip Mill is controlled by operators using state-of-the-art, automated equipment from pulpits, or glass enclosed climate regulated booths, that overlook the quarter-mile long process.

b. **Pickle Line.** From the Hot Strip Mill, the coiled steel moves to the "Pickle Line," where coils move through an acid bath that cleans the surface of the steel. Some of the coils that emerge from the Pickle Line are shipped directly to customers. Others are transported to other parts of the plant for further finishing operations.

c. **Cold Rolling Reduction Mill.** At the Cold Rolling Reduction Mill, sheet steel is rolled precisely via a computer-controlled process in widths from 24 to 72" and in thickness of 0.014 to 0.135". The mill can produce in excess of one million lineal feet – 189 miles – of cold rolled strip in an eight hour shift.

d. **Galvanizing Operation.** After cold rolling, the steel may then move to the Galvanizing Operation for special anti-corrosive coatings and other finishes. Until recently, U. S. Steel used two

methods at Gary Works to apply these special anti-corrosive coatings and other finishes, specifically, an electro-galvanized process (EGL) or a hot dipped galvanizing process. In December of 2007, U. S. Steel ceased using the EGL process and is exclusively using the hot dipped galvanizing process, whereby a hot dipped galvanizing line (*i.e.*, No. 6 Galvanizing Line) produces light and intermediate sheet products for use in the automotive, appliance, metal building, and home construction industries.

e. **Tin Finishing Mill.** Pickled steel coils may also be transported to the Tin Finishing Mill. Steel used in food and beverage containers, aerosol cans, paint cans and pails is finished in the Tin Products Division of Gary Works. Hot rolled and pickled strip is reduced in thickness on a six-stand cold reduction mill and then cleaned and electrolytically coated with tin. Gary Works has two electrolytic tin coating lines.

II. THE UNION-REPRESENTED WORK FORCE AT GARY WORKS AND THE BASIC LABOR AGREEMENT ("BLA")

12. There are approximately 5,000 employees at Gary Works, including approximately 500 employees who work as managers or non-union represented clerical workers. The remaining 4,500 employees at Gary are represented by the largest industrial labor

union in North America, specifically, the United Steelworkers of America, AFL-CIO-CLC ("USWA"), including 4,000 production and maintenance employees and approximately 500 clerical, technical, and security employees..

13. Since 1937, U. S. Steel.and the USWA have engaged in collective bargaining regarding wages, hours of work, and other terms and conditions of employment at U. S. Steel's facilities around the country. The current collective bargaining agreement, *i.e.,* the *Basic Labor Agreement Between U. S. Steel and the USWA,* became effective as of May 20, 2003 and is set to expire this year on September 1, 2008. The current *Basic Labor Agreement* is referred to herein as the "BLA".

14. The 4,000USWA-represented production and maintenance employees at Gary Works are also members of one of two USWA Local Unions. *Local Union 1014* represents the production and maintenance employees in units of the Gary Steel Plant (Gary East") at Gary Works. These units include the Coke and Chemicals Division, Iron Producing Division, Steel Producing North Division, Steel Producing South Division, and the Operations Services Division. *Local Union 1066* represents the production and maintenance employees in units in the finishing operations at Gary Sheet & Tin ("Gary West") at Gary. These units include the Hot Rolling Division, Sheet Products Division, and the Tin Products Division. There are two additional local unions at Gary, Local 2695, which represents the clerical and

technical employees, and Local 2695-6, which represents security and fire protection employees.

15. The BLA sets forth the terms and conditions of employment for the production and maintenance workers at all of U. S. Steel's domestic steel producing facilities, including Gary Steel and Gary Sheet and Tin at Gary Works. The BLA contains provisions that address such matters as wages, hours of work, position titles, labor grades, job descriptions, workplace procedures, union security, health, safety and the environment, civil rights, paid time off, training, economic opportunities, and joint Company and Union efforts. A copy of the 2003 BLA is attached hereto as **Exhibit One** to my declaration.

16. The BLA also expressly contemplates and provides for the existence and utilization of **"Local Working Conditions"** that the BLA defines as "specific practices or customs which reflect detailed applications of matters within the scope of wages, hours of work or other conditions of employment, including local agreements, written or oral, on such matters." *BLA Art.5, § A.1 at page 62.* The BLA further recognizes that "[i]t is impractical to set forth in this Agreement all of these working conditions, which are of a local nature only, or to state specifically in this Agreement which of these matters should be changed or eliminated." Id.

17. Accordingly, under Article V (A) of the BLA, a Local Working Condition can arise by way of a local agreement (which, at Gary Works, would arise from

bargaining between plant management and representatives of Local 1066 and/or Local 1014) or by way of a "custom or practice," which is generally not written but arises over time as a result of a recognized and consistent response to a recurring situation.

18. The BLA provides that no Local Working Condition can deprive an Employee of the rights granted in the BLA and, further, that "[n]o Local Working Condition shall be established that changes or modifies any provision of [the BLA]," except as approved in writing by the national Chairs of the parties' respective Negotiating Committees. *BLA Art.5, § A. 6 at page 63.*

19. In the 2003 BLA, the Company and Union agreed to additional requirements with respect to Local Working Conditions so as to facilitate the objectives of the sweeping changes set forth in the Workplace Restructuring and Productivity provisions of Appendix C of the BLA (at pages 198-208), which were intended to remove barriers that would interfere with maximizing the flexibility and productivity of the work force. Id. Specifically, Article 5(A)(6)(b) of the BLA provided that any Local Working Condition established prior to May 20, 2003 that would interfere with the attainment of the objectives of the Workplace Restructuring would be eliminated and that all future Local Working Conditions must be in writing signed by the Plant Manager and the Local Union President or Unit Chair. *BLA Art.5, A. 6 at page 63*

20. While the BLA memorializes specific agreements regarding the terms and conditions of employment for all production and maintenance employees, the BLA also recognizes that the company has the right to manage and operate its business. Specifically, the **Management Rights Clause** provides as follows:

> The Company retains the exclusive rights to manage the business and Plants and to direct the working forces. The Company, in the exercise of its rights, shall observe the provisions of this Agreement.
>
> The rights to manage the business and Plants and to direct the working forces include the right to hire, suspend, or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work or for other legitimate reasons.

BLA Art.5, § J at pages 105-106.

21. Pursuant to the Management Rights Clause, U. S. Steel has adopted specific rules and policies at Gary Works with respect to the process of operating its facilities and directing its employees, ranging from such matters as safety, drug abuse, work schedules, shift times, and reporting procedures.

H. WORKPLACE PROCEDURES AT GARY WORKS

UNDER CURRENT COLLECTIVE BARGAING AGREEMENTS

A. The Provisions of the BLA

22. Article V of the BLA is entitled "Workplace Procedures" and sets forth the specific agreements between the Company and the Union with respect to such matters as Local Working Conditions and Management Rights (as discussed above), new or changed jobs, hours of work, absenteeism, overtime, seniority, continuous service, testing, the grievance and arbitration procedures, and the prohibition against strikes and lockouts.

23. Article V, Section C of the BLA expressly deals with "Hours of Work" and provides for a regular workday of eight (8) consecutive hours and a regular work week of five (5) consecutive days out of a seven (7) day period. The BLA specifically defines the "Normal Workday and Work Week" as follows:

> The normal workday shall be any regularly scheduled consecutive twenty-four (24) hour period comprising eight (8) consecutive hours of work and sixteen (16) consecutive hours of rest. The normal work week shall be five (5) consecutive work days beginning on the first day of any seven (7) consecutive day period.

BLA Art.5, §, C (1)(a) at pages 65-66.

24. Article V, Section C of the BLA also defines the manner in which hours of work within a normal work day will be set and paid for:

> Schedules showing the Employees workdays shall be posted or otherwise made known to Employees. . . . . [E]mployees shall be paid for all shifts, which are part of their originally posted schedule, unless an Employee fails to work as scheduled for reasons such as disciplinary time off, absenteeism or report-off time for Union business. All shifts not included on the originally posted schedule shall be considered overtime shifts,. . . ."

BLA Art.5, § C(1) (b)-(d) at page 66.

25. Article V, Section C of the BLA also guarantees the economic opportunities provided by the work schedules posted for each employee. Article V, Section C(4) provides for a full week guarantee ("[an Employee scheduled to work will receive, during a payroll week, an opportunity to earn at least forty (40) hours of pay (including hours paid for but not worked, . . . ") and Article V, Section C(5) provides for a Full Day Guarantee (lain Employee who is required to report and reports to work shall be paid for the greater of (a) eight (8) hours or (b) the hours actually worked. . . ."). *BLA Art.5, § C(4)-C(5) at page 68.*

26. Article V, Section C (2) of the BLA deals with absenteeism and provides that, "[i]t is expected that Employees shall adhere to their schedule" and that, consistent with the Management Rights provision of the BLA, "reasonable rules for the implementation of

these principles shall be developed by the Company and made known to the Employees." *BLA Art.5, C(2) at page 67.*

B. Scheduled Shifts and Reporting Procedures

27. In accordance with rules promulgated pursuant to Article V of the BLA, U. S. Steel has adopted specific rules and policies with respect to the process of operating its facilities and directing its employees. Included among those operational rules at Gary Works, is the longstanding practice that production and maintenance employees are required to be at their assigned work location at the commencement of their shift. Specifically, employees are required to be at their actual work area at their start time. As such, simply being in the plant, or in a locker room, or being on their way to their work location has never been considered "being at work." To the contrary, employees who are not at their work station at the beginning of their shift are subject to docking of pay and disciplinary actions for being tardy. That reporting procedure has been in place, at the very least, during my entire tenure of over 30 years at Gary Works and, the reporting requirements have been enforced and upheld in countless arbitration awards dealing with the issues of tardiness or absenteeism.

28. There are seven (7) entrances or gates at Gary Works that are customarily used by employees to access the plant. These gates are spread the length

of the plant and are accessed by city streets. The gates are shown on the schematic drawing of Gary Works attached to my Declaration as **Exhibit Two**.

29. With few exceptions, employees drive their personal vehicles to Gary Works and park in areas outside of the access gates. The parking areas are owned and maintained by the Company and are generally a short distance from the gates where the employees enter the plant. The parking areas are also shown on the schematic drawing attached as **Exhibit Two** to my Declaration.

30. Access to the plant is authorized by means of an automated access system that allows employee access to the plant through a secure gate system by way of a swipe of a personal identification card. The swipe system records when an employee enters or exits Gary Works. The swipe system is designed for and is intended to be a security system; it is not used to record hours of work. As discussed above, hours of work are set by the individual work schedules in accordance with Article V, Section C and as confirmed by the employee's shift manager.

31. Upon entering Gary Works, some employees walk directly to their assigned work location or to a locker room where they can change their clothes. Some employees may choose to take company-provided buses to their work location or to their locker room.

32. The Company provides over 50 wash houses and wash and locker facilities throughout the plant

and I have indicated the location of the primary locker rooms on the schematic drawing that is attached as **Exhibit Two** to my Declaration. The locker rooms include changing and washing facilities for those employees who must change into certain work clothes or for those who wish to use the facilities for their own convenience. By longstanding custom and practice, employees are permitted to be in their locker rooms for whatever duration they wish before the commencement of their shift. However, they are not "at work" until they are at their assigned work/ reporting location.

33. The Company provides protective clothing and equipment to any employee whose job requires that such clothing be worn or to any employee who desires to wear such clothing for his or her own convenience. Although the full complement of protective clothing worn by any individual employee depends on that employee's specific job or assignment (or, at times, the employee's own preferences), the following protective clothing is provided by the Company and worn by most of the employees:

a. Safety Glasses. Protective eyewear must be worn by all employees at all locations throughout Gary Works, except in enclosed, non-production facilities, such as offices.

b. Hard Hat. Hard hats are worn in all work locations with the only exceptions being the walkways from the plant entrance to the locker or change rooms or the line-up areas. Some models of the

supplied hard hats may have a clear face shield that is affixed to the hard hat and is not separately put on.

c. *Protective Footwear.* Most employees at Gary Works must wear protective foot wear, which are shoes that include protection by way of a special toe box (e.g., steel-toed shoes) and metatarsal guards. Shoe brands and types are approved by Gary Works Safety and Industrial Hygiene Department and are available at Gary Works and at certain retail outlets. The BLA provides the Employees with a Safety Shoe allowance. See Exhibit One *(BLA, Article III, Section N at Page 57).*

d. *Jackets and Pants.* Certain jobs at Gary Works require employees to wear flame retardant jackets and/or pants and are also supplied to employees who choose to wear such clothing (although not specifically required). Formerly known as "greens" due to the color of the jackets and pants, Gary Works recently moved to orange clothing due to increased visibility and, thus, improved safety. Accordingly, the jackets and pants are now known as "Oranges." Oranges at Gary Works, both the jacket and the pants, are made of Whipcord Indura and are manufactured by Steel Grip, Inc. Photographs and other information regarding this clothing from the manufacturers web site is attached hereto as **Exhibit Three** to my Declaration. Except for its flame retardant qualities, the jackets and pants are just like other work clothes in terms of feel, weight and fit. As a result, many employees at Gary Works choose to wear Oranges even though there is no requirement to do

so. The jackets and pants are bought, shipped, maintained and laundered by a vendor at the expense of the Company and made available at various locations at Gary Works.

e. Hand Protection. Employees at Gary Works are supplied gloves to protect employees from a variety of hazards such as cuts, punctures, abrasions, temperature, or possible exposure to chemicals. The type of glove supplied depends upon the particular tasks performed and conditions present for any given position. Generally, the gloves are not put on before the start of a shift, and not until needed at the specific work location.

f. Hearing Protection. All employees at Gary Works are issued one or more of a variety of hearing protective devices (HPDs) by the Company. The most common form of HPD looks like small ear-insertable audio headphones and are as easy as such to put on. Generally, HDPs are carried with the employees to their work location (or attached to their hard hat) and put on at the start of their shift.

f. [sic] *Additional Protective Clothing* (e.g., snoods, hoods, spats, leggings and wristlets). There are some jobs at Gary Works where additional protective clothing is required and/or recommended. Such additional clothing, such as a snood (which is a fabric hood that covers the head and neck area like a hood), leggings and/or spats (which fit over the lower pants leg), and wristlets (which are in the nature of a wrist band and serves to prevent dirt or debris from

entering the sleeve) are supplied by the Company and, like the jacket and pants, are generally donned before the start of the shift.

g. Respiratory Protection (respirator). U. S. Steel's policy for implementing OSHA's Respiratory Standards emphasizes the use of engineered controls such as exhaust ventilation, substitution, and isolation. However, when personal respiratory exposures could exceed permissible exposure levels or where employees are assigned to a job or position where effective engineering controls are not feasible, the employees are required to wear a form of respiratory protection. There are several types of approved respiratory protection supplied by the Company and the specific type depends on the conditions that could be encountered at a given job. Respirators are generally not donned prior to the start of a shift or prior to the employee reporting to his or her work location. To the contrary, employees assigned respirators put them on at the work location or when necessary.

h. Other protective equipment often depicted in photographs of steel industry employees, such as aluminized suits, chemical suits, or welders' hoods and the like, are not donned by the employee before his or her shift, but are kept at and put on at the work location when, and if, required during the employee's shift.

i. **I** gathered actual physical examples of the protective clothing and equipment described in subparagraphs a through g above and placed those

samples in a box that has been marked as **Exhibit Four** to my Declaration. The box containing these samples will be deposited with the Clerk's office of the United States District Court for the Northern District of Indiana, Hammond Division coincident with the filing of this Declaration in order to make these items available for inspection by the Court and opposing counsel. I also caused photographs to be made of every item that I gathered and placed into the box and have attached those photographs as **Exhibit 4(A)** to my Declaration.

34. I routinely don much of the protective clothing described above (sometimes several times a day) whenever I must enter into work or production areas in the plant. There is nothing particularly special or different with respect to the donning of this protective clothing and it generally takes me about three to five minutes to put on my jacket, pants, shoes, hard hat and safety glasses.

35. By longstanding agreement, custom and practice, any time spent donning the protective clothing described above (whether such clothing is required or is worn based on the employee's voluntary preference for his or her personal convenience) is not time that is paid for by U. S. Steel or otherwise time that is included within the term "hours of work" under Article V of the BLA. To the contrary, it is an activity, like walking to work, that is preliminary to the start of an employee's shift.

36. I am aware that, as far back as 1947, the Company and the Union agreed in a collectively bargained supplement to the then-current BLA that the Company would not pay employees for such preliminary activities such as traveling, walking time, and changing clothes. A copy of the *1947 Supplemental Agreement* is attached hereto as **Exhibit Five** to my Declaration.

37. The provisions of the 1947 Supplemental Agreement were expressly referenced and continued as an incorporated part of every BLA thereafter until the current 2003 BLA and, as a result, there has been a longstanding agreement, custom and practice that such preliminary or preparatory activities (*e.g.*, traveling, walking time, and changing clothes on the Company's premises) would not be compensable time. See, for example, excerpt from the 1999 BLA, a copy of which is attached as **Exhibit Six** to my Declaration. Since the application of the 1947 agreement eliminated (and prevented) any practice or agreement that would result in payment for such preparatory activities, and since no such practice or agreement could arise under the 2003 BLA unless in writing, the parties did not need to address the continued viability of the 1947 Supplemental Agreement. Such activities are not now, and have never been, considered compensable time at any point during my tenure at Gary Works.

38. I am aware that the issues of the compensability of such pre-shift activities have arisen sporadically in the context of local bargaining at Gary Works.

In each instance, however, the long-standing agreement, custom and practice that such preliminary activities are not compensable has remained in place. For example, in 1983 Local Bargaining, representatives of Local 1014 submitted Local Issue No 1014-83-17, allegedly on behalf of the entire plant, which stated the issue as: "At the present time, we pick our time cards up at the gate, get on a bus, go to washhouse, change clothes and then go to line up area. We don't get paid until we get lined up. Pay portal to portal from the gates." The proposal was rejected and not agreed to by the Company. See *Local Issue Form* re; Issue No. 1014-82-17, attached hereto as Exhibit Seven to my Declaration.

39. The access, changing, and reporting procedures described above also apply to production and maintenance employees holding positions in the Gary Coke Plant, except that employees working at the Coke Plant are provided with a locker that provides, by way of a partition, for the separation of work clothes and street clothes. OSHA regulations require that clothes worn in a "regulated area" such as the coke plant are not to be removed from the locker room except in a closable container (which, at Gary, are removed by our contractor that is responsible for the cleaning and laundering of these garments).. See *Coke Plant Standard, 29 C.F.R. §1910.1029(i) and (h)(2)(v).* Accordingly, except for putting their street clothes into their "clean" locker, the agreements, customs and practices with respect to pre-shift activities apply equally to employees in the Coke Plant.

C. Buddy Relief at Gary Works

40. The reporting procedures described above with respect to production and maintenance employees at Gary Works apply to all positions throughout the plant. The only variations in these procedures exist with respect to those positions that are subject to a person-to-person relief system generally known at Gary Works as "buddy relief." Because many of the production processes at Gary Works are continuous operations, a significant number of employees relieve each other at or near the change of shifts at their actual work area. This type of shift change is referred to as "buddy relief' since the employee generally relieves his earlier shift counterpart in person and on a face-to-face basis. Buddy relief facilitates continuous operations and promotes on-going communication with respect to production issues that still have to be addressed or continued from turn to turn. Buddy relief provides reporting flexibility to the employees as the shift or turn of the relieved employee ends when his relief arrives, as opposed to an exact time. Variations of "buddy relief' may require only confirmation that your relief is in the work area and may not require a so-called "buddy punch" or actual face-to-face relief.

41. An informal system of buddy relief arose decades ago, initially as a local custom and practice at certain units located in Gary West, the finishing side of the plant. However, in the course of the 1980-1981 local bargaining with representatives of USWA Local 1066, specifically concerning an issue involving

the duration of "open gate periods" (or times when employees could exit at the end of their shift), the parties agreed to formalize a system of buddy relief. See Local Issues Committee Memorandum and related documents attached hereto as **Exhibit Eight** to my Declaration. Initially, buddy relief was introduced with respect to identified positions at the 84-inch Hot Strip Mill, the 84-inch Continuous Pickle Line, the No. 6 Electrolytic Tinning Line and 5-Stand North Sheet Mill. Id. Today, and with agreement of the Union, traditional buddy relief, or variations thereof, is used in units throughout the plant, including the Gary Coke Plant. As of April 1, 2008, 32.5% of all positions at Gary East are buddy relief jobs and 35.4% of all positions at Gary West are buddy relief positions. A summary of division specific totals of buddy relief jobs is attached hereto as **Exhibit Nine** to my Declaration.

42. As agreed with the Union, buddy relief provides, by definition, flexibility to the affected employees with respect to reporting or relief time. Accordingly, while relief must be accomplished by the established start time for the given shift or turn, relief can – and normally does – occur before the set start time and permits the relieved employ [sic] to "end his shift" at an earlier time. Positions that are "buddy relief' jobs are coded as such so as to permit that employee to exit the plant by swiping out at an access gate at a time that may be greater than six (6) minutes before the end of the shift without being penalized. In fact, a local issue that arose during the

1980-1981 local bargaining with respect to the Union's request that employees at Gary Sheet and Tin be provided with 20 minute wash-up time on all turns was withdrawn as "resolved on the basis of [buddy relief]. A copy of Local Issue No. U-80-1066-669, agreed on June 10, 1980 is attached hereto as **Exhibit Ten** to my Declaration.

43. At Gary Works, in the event that an employee's relief is tardy or absent, the employee must remain at the work station until his or her relief arrives or a replacement employee is provided. In such an event, the affected employee is paid overtime if the employee works past the scheduled eight-hour shift and the tardy or absent employee is subject to docking of pay and discipline. See, *for example, Arbitration Award in Grievance No. WGA-06-0093,* a copy of which is attached hereto as **Exhibit *Eleven*** to my Declaration. In that Arbitration Award, the Panel reproduced a copy of written relief procedures that are used (and have been used for over 15 years) in the Iron Making Division.

D. End Of Shift Activities; Doffing And Washing

(i). Doffing of Work Clothes

44. As discussed above, the Company and Union have agreed since at least 1947 that time spent in "preparatory and closing activities" before or after the scheduled shift, including time engaged in the donning and doffing of work clothes, will not be

compensable time. The observations above with respect to pre-shift activities applies equally to end of shift activities such as walking from the work site or changing out of work clothes, inasmuch as all such activities are not compensable by agreement, custom and practice.

45. I am aware that there have been isolated attempts by the Union to raise such matters in the context of local bargaining at Gary (see Paragraph 38 above), but the longstanding agreement, custom and practice that such post-shift activities are not compensable has remained in place

46. As little time as it takes generally to don the work clothing, it generally takes employees even less time to remove their work clothes at the end of the shift.

47. Only at the Coke Plant are the employees required to deal with their work clothes in a manner different from other units in the plant. At the Coke Plant, the existing OSHA regulations require that work clothes be placed separately from the employees' street clothes (either in a separate locker or in a locker specifically made to include a physical partition. Although the Coke Plant has this unique requirement regarding soiled work clothes, the established agreement, custom and practice with respect to the doffing of work clothes is equally applicable to the employees at the Coke Plant.

(ii). Wash-Up Time

48. Except for employees at the Coke Plant, there is no requirement whatsoever that any employee wash up or shower after the end of his shift. While U. S. Steel does provide and maintain numerous wash houses and locker rooms throughout the plant, whether an employee elects to wash up or shower is the employee's decision and for his own convenience.

49. As a general proposition, there is a longstanding agreement, custom and practice at Gary Works that time spent "washing up" after the end of a shift or turn is not compensable time. As with most matters of general application, however, numerous exceptions have arisen over the years in specific units throughout the plant where some wash-up time prior to the end of the shift has been provided of varying durations. In nearly every instance where a Local Working Condition with respect to the provision of some wash-up time has been established, the practice was limited to a specific unit-by-unit (and often, position-by position) basis. For example, the 1993 Local Issues Agreement at the Coke Plant continued the resolution of Local Issue 77-130 as follows:

> No. 77-1130. [Union] Request that straight day maintenance employees get 20 minutes for wash up time.
>
> [Company Response]. The issue is resolved on the basis that Coke Plant Carpenters, Pipe Coverers, Wiremen, and Painters stationed in the Shop west of the coke Plant

> assembly shops be allowed 15 minutes wash-up time.

Excerpt from 1999 Local Issue Agreement; Coke Plant at 32, attached hereto as **Exhibit Twelve**.

50. Where a Local Working Condition existed with respect to the provision of wash-up time in any given unit, such practice or agreement also recognized that any such wash up time was subject to the needs of the production schedule or at the discretion of the shift manager based upon the need to complete a given task. For example, the *1993 Local Issues Agreement* with respect to the *Iron Producing Division* expressly continued a 1977 local agreement (Local Issue 77-145) as follows:

> No. 77-145. [Union] Request that employees who are not receiving the buddy punch are to be given 20 minutes for wash up time.
>
> [Company Response]. Management is agreeable to releasing the time cards to employees in this group 15 minutes before the end of the turn. It must be understood, however, that such is at the discretion of the foreman in as much as these employees are not relieved and it will be necessary on occasion to work until the end of the turn or to work over to complete a given task which cannot be delayed until the next day.

Excerpt from 1999 Local Issue Agreement; Iron Producing, attached hereto as **Exhibit Thirteen**.

51. For many years, the subject of wash up time has been a common issue in local bargaining at Gary Works as the Local Union has attempted to address the basic agreement, custom and practice that such time is not compensable. For example, the issue of wash up time has been raised as a local bargaining issue involving at least the following units":

Central Maintenance and Field Service (Issue U-74-1066-207)

Maintenance Employees at the Coke Plant (Issue U-1014-77-130)

Blast Furnace Employees (not on 'buddy relief) (Issue U-1014-77-145)

Gary Steel, Division 7 (Issue U-1014-77-303)

Machine Shop (Issue U-1014-77-344)

Mason Department (Issue U-1014-77-431)

Gary Sheet and Tin, Section 4 (Issue V-1066-77-175)

Certain Coke Plant Employees (Issue 1014-80-7)

Central Maintenance (Fab Shop) (Issue U-1014-80-284)

Central Maintenance Shop (Issue U-1014-80-327)

Central Maintenance (Paint shop) (Issue U-1014-80-833)

Machine Shop (Issue U-1014-80-338)

Gary Sheet and Tin (Issue U-80-1066-669)

Rail Mill (hot mill and hot bed rolling crews) (Issue 83-1014-145)

Fab Shops (Issue 1014-83-170)

Coke Plant Employees) (Issue 1014-83-312)

Gary Steel (Issue U-1014-93-134)

I have attached hereto as **Exhibit Fourteen** to my Declaration a compilation of various Local Issue Forms that have raised the matter of wash up time in one form or another (some of which show the nature of the disposition and are signed by representatives from both the Local Union and the Company).

52. As a result of the specific agreement in the 2003 BLA between the Union and the Company, any previous Local Working Condition that provided wash-up time at any given unit that was not contingent upon and restricted by the demands of the production schedule was subject to termination by the provisions of Article 5, § A.6 of the BLA ("a Local Working Condition established prior to May 20, 2003, which would interfere with the attainment of the Workplace Restructuring objective . . . will be eliminated"). Nevertheless, certain Local Working Conditions regarding wash up time, including local agreements and practices, that did not interfere with or diminish productivity could survive the provision of the 2003 BLA. For example, I am aware that in the Coke Plant there is a practice of permitting

employees who work on the batteries to be released from their workstations 15 to 20 minutes before the scheduled end of their shift to allow for wash-up time, *provided* that the requirements of the pushing schedule and other production needs at the Coke Plant have been fully satisfied.

53. The current 2003 BLA is set to expire on September 1, 2008, and, as a result, negotiations with respect to a successor agreement have begun. In that regard, I have participated in local bargaining at Gary Works with respect to a variety of local issues. Within the past two weeks, in the context of local bargaining with representatives of USWA Local 1014, the Union again raised as a local issue a request that all employees in Zone 2 (Iron Producing) receive 20 minutes wash-up time. Local 1014 Local Issues, submitted May 13, 2008, is attached hereto as **Exhibit Fifteen** to my Declaration.

V. PAYROLL PROCEDURES AT GARY WORKS

54. The U. S. Steel Wage Payroll System automatically records eight (8) hours worked for each regular shift that the employee is scheduled, provided that their elapsed time in the plant on a scheduled day is at least eight hours (according to the times they swipe in and out via the gate access system). Any changes in the actual hours worked on a given shift, whether as a result of tardiness, an early departure for any of a variety of reasons, unscheduled overtime, and the like, are entered into the system by

the employee's shift manager at the end of every shift. Certain events, such as when an employee's elapsed time in the plant does not equal the number of hours of his scheduled shift, will result in an error message generated by the system that requires the shift manager to enter an adjustment and explanation.

55. For each employee, the Wage Payroll System tracks all scheduled shifts, scheduled hours, hours worked, paid hours, overtime hours, swipe times, and requires that other specific information and/or explanations be entered with respect to payroll events such as an absence, a tardy, a meal allowance, when an employee is sent home, a call out, and number of other allowance codes.

56. The union-represented employees at Gary Works are paid every two weeks and are provided with detailed payroll information whether they receive a pay check or have elected direct deposit. The Record of Earnings and Deductions provided to each employee for each pay period identifies the following earnings information for the applicable pay period: base earnings, incentive pay, shift differential, premium pay, meal allowance, and any other applicable allowances. Similarly, the Record of Earnings and Deductions also provides the following information with respect to hours worked during the applicable pay period: position(s) worked and, with respect to each position worked, the regular hours worked, Sunday, holiday or premium hours worked, overtime hours worked and applicable incentive rates. I have

attached hereto as **Exhibit Sixteen** to my Declaration, a representative copy of a Record of Earnings and Deductions (*i.e.*, a pay stub) for one pay period for each of the named plaintiffs (each copy has been redacted to remove the individual's employee number)

VI. THE NAMED PLAINTIFFS

57. I understand that the following individuals are named plaintiffs in the pending lawsuit: Clifton N. Sandifer, Nicole L. Andrews, Dora V. Anderson, Herbert H. Harris, Bernard Jenkins, Alvin Mitchell, Marilyn Walton, and Kenneth E. Williams. As Manager of Employee Relations at Gary Works, I am responsible for, and have custody of, personnel records that are maintained with respect to each employee at Gary Works. The personnel records show the following with respect to the Named Plaintiffs in the lawsuit.

58. Plaintiff, **Clifton N. Sandifer**, began employment at the U. S. Steel Gary Works on September 1, 1977. Since approximately January 2004, he has held the following position at Gary:

916/03-present	
Operating Technician 2	Hot Rolling Div.
Maintenance Technician – Mechanical	H. S. Mill Maintenance Dept. 84" Hot Strip Mill Area

Mr. Sandifer remains an active employee at Gary Works.

59. Plaintiff, **Nicole L. Andrews**, was employed at the U.S. Steel Gary Works from August 20, 2001 until her discharge on December 21, 2005. From approximately January 2004, until her employment was terminated, she held the following positions at Gary:

3/29/04-10/30/05	
Utility Person – Batteries Oven Door Adjuster	Gary Coke Operations Div. Coke Production Dept. Batteries Area
10/30/05-12/21/05	
Utility Person- Material Unloader & Utility Person	Iron Producing Div. Blast Furnace Dept. South Blast Furnaces & Aux Area

In 2005, Ms. Andrews was working under a Last Chance Agreement entered into between the Company and the Union on October 25, 2005, arising from several 5-day suspensions that had been issued to Ms. Andrews during the period from May 23, 2005 to October 4, 2005. In December 2005, Ms. Andrews was issued a 5-day suspension for failure to report to work on time and for violation of the Last Chance Agreement. After a hearing on that suspension, her suspensions were converted to a discharge for cause effective December 21, 2005.

60. Plaintiff, **Dora V. Anderson**, was employed at the U. S. Steel Gary Works from August 21, 1974, until her retirement on July 31, 2007. From approximately January 2004, until the time of her retirement, she held the following position at Gary:

8/25/02-7/31/07	
Oven Heater	Gary Coke Operations Div. Heating Dept. Coke Production Area

Ms. Anderson retired effective July 31,2007.

61. Plaintiff, **Herbert H. Harris**, began his employment at the U. S. Steel Gary Works on August 19, 1974. Since approximately January 2004, he has held the following position at Gary:

6/10/03-Present	
Gas Tender	Gary Coke Operations Div. Batteries Dept. Coke Production Area

Mr. Harris remains an active employee at Gary Works.

62. Plaintiff, **Bernard Jenkins**, began his employment at the U. S. Steel Gary Works on August 18, 1997. Since approximately January 2004, he has held the following positions at Gary:

8/11/03-12/19/05	
Senior Coal Heating Utilityman	Gary Coke Operations Div. Coal Preparation Dept. Precarbon Area
12/19/05-3/12/06	
Transfer Car Operator	Steel Producing, South, Div. #1 BOP Operating Dept. #1 BOP Area

3/12/06-5/22/06 Ladle Operator	Steel Producing, South, Div. #1 BOP Operating Dept. #1 BOP Area
5/22/06-7/2/06 Material Handler	Steel Producing, South, Div. #1 BOP Operating Dept. #1 BOP Area
7/2/06-5/30/07 Pit Utilityman	Steel Producing, North, Div. #2 QBOP Operating Dept. #2 QBOP Area

Mr. Jenkins has been off work due to a non-occupational disability from May 30, 2007 to the present time.

63. Plaintiff, **Alvin Mitchell**, began employment at the U. S. Steel Gary Works on August 30, 2004. Since approximately January 2004 he has held the following position at that facility:

9/15/03-12/26/07 EGL Operator (Electrogalvanizing Line)	Sheet Products Div. EGL Line Dept. Galvanizing Area
12/26/07-3/24/08 Bander	Sheet Products Div. Hot Rolling Dept. Hot Roll Finishing Area

3/24/08-present	
breaking in as Diesel Burner (also working as Bander)	Sheet Products Div. Hot Rolling Dept. Hot Roll Finishing Area

Mr. Mitchell remains an active employee at the Gary Works.

64. Plaintiff, **Marilyn Walton**, was employed at the U. S. Steel Gary Works from August 30, 2004 until her discharge on January 3, 2007. From January 2004, until the time of her discharge, she held the following position at that facility:

8/30/04-1/3/07	
Utility Person-Batteries Door Cleaner	Coke Operations Div. Batteries Dept. Coke Production Area

On December 29, 2006, Ms. Walton was issued a 5-day disciplinary suspension.

Following a hearing, the suspension was converted to a discharge for cause, effective January 3, 2007.

65. Plaintiff, **Kenneth E. Williams**, was employed at the U. S. Steel Gary Works from October 18, 1994, until he was discharged on August 14, 2006. From January 2004, until the time of his discharge, he held the following position at that facility:

2/9/03-8/14/06
Oven Heater

Coke Operations Div.
Heating Dept.
Coke Production Area

Mr. Williams was discharged for cause following a 5-day suspension on August 7, 2006, for failure to follow procedure and for violation of a Last Chance Agreement that resulted from five previous suspensions. The suspension was converted to discharge effective August 14, 2006.

I declare under penalty of perjury that the *foregoing is true and correct. See 28 U.S.C. §* 1746.

/s/ Keith Kolb
Keith A. Kolb

Executed on May **36**, 2008.

PETITIONER'S BRIEF

No. 12-417

In The
Supreme Court of the United States

CLIFTON SANDIFER, *et al.*,

Petitioners,

v.

UNITED STATES STEEL CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Under the Fair Labor Standards Act, the period of time during which a covered employee must be paid begins when the worker engages in a principal activity. Donning and doffing safety gear (including protective clothing) required by the employer is a principal activity when it is an integral and indispensable part of the activities for which the worker is employed. However, under section 203(o) of the Act an employer need not compensate a worker for time spent in "changing clothes" (even if it is a principal activity) if that time is excluded from compensable time under a bona fide collective bargaining agreement applicable to that worker.

The question presented is: what constitutes "changing clothes" within the meaning of section 203(o)?

PARTIES

The petitioners are approximately 800 current or former employees at the United States Steel's Gary (Indiana) Works and several other plants, who brought or joined this action asserting that their employer failed to compensate them for all the hours they worked, as required by the Fair Labor Standards Act.

The respondent is the United States Steel Corporation.

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OPINIONS BELOW

The May 8, 2012 opinion of the Court of Appeals, which is reported at 678 F.3d 590 (7th Cir. 2012), is set out at pp. 1a-20a of the Petition Appendix (Pet.App.). The June 11, 2012 order of the Court of Appeals denying rehearing en banc, which is not reported, is set out at p. 82a of the Petition Appendix. The January 5, 2010 Opinion and Order of the District Court for the Northern District of Indiana, which is unofficially reported at 2010 WL 61971 (N.D.Ind. Jan. 5, 2010), is set out at pp. 21a-33a of the Petition Appendix. The October 15, 2009 Opinion and Order of the District Court for the Northern District of Indiana, which is unofficially reported at 2009 WL 3430222 (N.D.Ind. Oct. 15, 2009), is set out at pp. 34a-81a of the Petition Appendix.

JURISDICTION

The decision of the Court of Appeals was entered on May 8, 2012. A timely petition for rehearing and rehearing en banc was denied on June 11, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). On February 19, 2013, this Court granted certiorari limited to Question 1 in the petition.

STATUTES AND REGULATION INVOLVED

The statutes and regulations involved are set out in the Appendix to the brief.

STATEMENT

Legal Background

The Fair Labor Standards Act (FLSA) generally requires that a covered employer pay overtime, at a rate one and one-half times the regular rate, to a covered employee who has worked more than forty hours in any given week. 29 U.S.C. § 207(a)(1). The statute itself does not define "work," or "workweek" (the actual language of section 207(a)(1)). Because the meaning of those terms determines an employer's obligation to pay overtime, they have been the subject of considerable controversy since the enactment of the statute. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 25-29 (2005).

Work begins when an employee engages in the first "principal activity" of the day, and continues until the last principal activity. *Id.* at 33-37. Consistent with the decisions of this Court, the Department of Labor has adopted the continuous workday rule, which means that the "workday" is generally defined as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." 29 C.F.R. § 790.6(b). In *Steiner v. Mitchell*, 350 U.S. 247 (1956), this Court held that activities such as donning and doffing

protective gear "are compensable ... if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed...." 350 U.S. at 256. In this case the court of appeals concluded that the donning and doffing of protective gear by the workers in this case was indeed "an integral and indispensable part of the workers' main activity ... and therefore a principal activity." Pet.App. 12a.

But the FLSA contains a narrow exception to the rule that an employer must pay time and one-half overtime for any work in excess of forty hours in a week. Under section 203(o), in determining the hours for which an employee is employed, "there shall be excluded any time spent in *changing clothes* or washing at the beginning or end of each workday which was excluded from measured working time ... by the express terms of or a custom or practice under a bona fide collective-bargaining agreement." 29 U.S.C. § 203(o) (emphasis added). In other words, where the section 203(o) exclusion applies, an employer need not compensate a worker for changing clothes or washing that would otherwise be a principal activity, and that activity does not start (or mark the end of) the workday for overtime purposes.[1] At a non-union plant,

[1] The courts of appeals are divided as to whether a principal activity that is non-compensable under section 203(o) may nonetheless trigger the start of the workday. *Compare* Pet.App. 11a-13a *with Franklin v. Kellogg Co.*, 619 F.3d 604, 618-19 (6th Cir. 2010). This Court declined to grant certiorari with regard to that question. *See* Petition, i; 133 S.Ct. 1240 (2013).

time spent on clothes changing that is a principal activity is compensable and (if the workday continues for long enough) may give rise to an obligation to pay overtime. On the other hand, at a unionized plant the company and union may agree that clothes-changing time is not part of the workday.[2] But aside from the specific terms of section 203(o), and certain other provisions not relevant here, a union does not have the authority to bargain away any of a worker's individual statutory rights under the FLSA. Except for "washing," which is not at issue here, section 203(o) applies only to "changing clothes."

Section 203(o) has given rise to a substantial volume of litigation regarding the meaning of "changing clothes." The lower courts have disagreed about two inter-related questions: what objects are "clothes" and what actions constitute "changing" clothes?

The Personal Protective Equipment Used At U.S. Steel

This case originated at the Gary Works, U.S. Steel's flagship facility, an integrated steel plant spread across nearly 3,000 acres in Gary, Indiana.[3]

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[2] The lower courts are divided as to whether under section 203(o) a worker's rights can be lost without the conscious agreement of the union.

[3] Although the vast majority of the workers opting into this collective action are or were employees at Gary Works in Indiana, a substantial number of employees also opted in from

(Continued on following page)

Gary Works produces steel from iron ore and other raw materials, and manufactures from it a variety of flat-rolled steel. The plant employs approximately 5,000 workers, including about 4,500 union-represented employees who work in production and maintenance. Pet.App. 35a-36a.

Gary Works, like all steel plants, is a dangerous place. Some employees work near molten steel, and are at risk of molten metal or sparks landing on them. Other tasks are in close proximity to powerful acids or other dangerous chemicals, or in environments where the air is so noxious that respirators are required. In certain jobs workers are near large moving steel product or powerful machinery. In portions of the plant the production or manufacturing process results in hard objects or dangerous chemicals flying through the air. There are dangerous high-voltage cables, and some work must occur at a considerable height above the ground. Any of these problems can result in serious injury, illness, or even death.

U.S. Steel imposes a wide range of practices and procedures to reduce risks to its workers. Those safety measures are the result of the overlapping requirements of the federal Occupational Safety and Health Act, the similar Indiana law and the applicable collective bargaining agreement, and of the

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U.S. Steel's plants in Granite City, Illinois and Ecorse and Troy, Michigan.

company's recognition that work-related injuries or deaths are bad for business. A linchpin of those safety measures is the requirement that employees wear safety equipment, referred to at the plant as Personal Protective Equipment (PPE). Each employee receives a 37-page pamphlet entitled "Personal Protective Equipment," which details the purpose, nature, and proper use and maintenance of each of the safety items. Employees are also issued a General Plant Safety Rules book and a Code of Ethical Business Conduct, which emphasize the requirement that every worker wear the appropriate PPE. The job responsibilities of each employee are carefully assessed to determine what PPE should be worn. Workers receive in person, video and written training in the relevant safety procedures. A worker's exposure to dangerous substances may be monitored, and the results can lead to a change in the PPE to be used. A worker's failure to wear the required PPE can and does lead to disciplinary action.[4]

Workers enter the plant at one of seven different gates and proceed to locker rooms where much of their assigned PPE is stored.[5] The workers put on their PPE and then go to their work station; because of the size of the plant, some employees travel from the locker room to their work station by bus.

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[4] J.A. 54-60.

[5] Some other safety equipment (such as a welder's helmet), not at issue in this case, is stored and donned and doffed at a worker's job site during the work shift.

At the end of the day the workers return to the locker room and take off the PPE. In some instances workers take showers before returning home. Pet.App. 38a.

The particular PPE items which a worker must wear depend to some degree on his or her job. U.S. Steel put in the record a box of exhibits which contains the twelve most commonly required PPEs: a hardhat, safety glasses, earplugs, a respirator, a "snood," a flame retardant hood, a flame retardant jacket, "wristlets," work gloves, flame retardant pants, "leggings," and metatarsal (steel-toed) boots.[6] The jacket and pants are infused with an unidentified chemical which reduces the risk that they will be set afire by molten metal or sparks. The snood is a hood-like covering that goes over the head and extends over part of the chest and shoulders, and has an opening for the face. The wristlet is a Kevlar sleeve, cylindrical in shape and about fifteen inches long, that is worn over the lower arm and upper part of the glove to keep dangerous objects from getting into the glove. The legging is a Kevlar rectangle, approximately five inches by fifteen inches, with Velcro straps at

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[6] The Seventh Circuit's list of the disputed items omits the hood, the wristlet, the leggings and the respirator. Pet.App. 4a. The model whose photograph appears in the court of appeals' opinion (Pet.App. 5a) is not wearing the ear protection, the hood, the respirator, the wristlets or the leggings, all of which were in the box of exhibits from which the other items were taken.

either end. It is held in place in front of the lower leg by the straps around top and bottom of the lower leg, and is used to prevent molten metal or other dangerous items from getting into a worker's boots.

Laundering the flame retardant jacket and pants must be done in a particular way to preserve their flame retardant quality. Bleach attacks the flame retardant treatment, and harsh laundry soaps can leave fatty acid deposits, which adhere to the fabric and compromise the flame retardant clothing. Fabric softeners must not be used. The maximum wash temperature is 140 degrees and the maximum dry temperature is 160 degrees. The items must never be boiled or steam cleaned, or cleaned with solvents. The jacket and pants must not be washed with synthetic garments, because fibers from synthetic clothing could adhere to the jacket or pants, reducing the effectiveness of the flame retardant treatment.[7]

There are several significant differences among the workers regarding the utilization of PPE. First, which PPE a worker is required to wear depends on his or her job. A respirator, for example, is mandatory in the coke unit, but may not be needed in other units. Second, there are different versions of some of the commonly used types of PPEs. There are several types of hardhats, ear protection, and eye protection, and many kinds of gloves, including eight different types of rubber and synthetic gloves. Third, the PPE

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[7] Dkt. 134-34, Exhibits D at 11 and E at 61-62.

is ordinarily put on (and taken off) at the locker room, but practice varies with regard to the respirators; some workers put the respirator over their face at the locker room, while others do not do so until they reach their job site or perhaps until their shift begins; the latter would either carry their respirators to and from the locker room or put the respirator around their necks.[8] Fourth, while many workers simply put the PPE on *over* their street clothes, others may take off their pants and/or shirts (or blouses and/or skirts) before donning the PPE.[9] There may be disputes of fact regarding the extent to which some items are donned and doffed at the locker room,

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[8] The workers' declarations consistently refer to putting on the PPE before going to their work station and taking it off only when back in the locker room, and make no distinctions in this regard among the various types of PPE. Dkt. 134-1 to 134.40. U.S. Steel, on the other hand, contends that workers "generally" do not put on their gloves or hearing protection until their shift started. Regarding respirators, the company contends that "[r]espirators are generally not donned prior to the start of a shift or prior to the employee reporting to his or her work location." Reply/Response Brief of Defendant-Appellant/Cross-Appellee United States Steel Corporation, 5.

[9] Several declarations expressly state that the worker put on his or her PPE over his or her "regular clothing." Dkt. 134-35, ¶ 4; Dkt. 134-39, ¶ 3; Dkt. 134-40, 40, ¶ 3. In many other declarations workers describe having to launder at home both contaminated shirts and contaminated pants, which necessarily means that the flame retardant jacket and pants were being put on over the worker's pants and shirt. Dkt. 134-6, p. 2; Dkt. 134-8, p. 2; Dkt. 134-9, p. 2; Dkt. 134-11, p. 2; Dkt. 134-16, p. 2; Dkt. 134-17, p. 2; Dkt. 134-20, p. 2; Dkt. 134-25, p. 2; Dkt. 134-34, p. 2.

rather than the job site, and the extent to which workers put on PPE over their street clothes rather than in place of those clothes.

When workers arrive at the plant, they swipe a time card at the entry gate to the plant. Employees whose gate time is not recorded at least 12 to 20 minutes before their official shift begins are considered tardy and their pay is docked.[10] But employees are only paid for the eight hours that they spend at their work stations during their shift. They are not compensated for the time they spend putting on and taking off the PPE, or for the time required to travel between the locker room and their work stations.[11] Because an employee normally works five eight-hour shifts a week, if the time donning and doffing the PPE (and the intervening travel time) were compensable, it would be paid at a rate one and one-half times the worker's regular rate. 29 U.S.C. § 207(a). The parties are in disagreement regarding how much time workers spend on these uncompensated activities; the amount of time necessarily varies from worker to worker. Pet.App. 76a-80a.

Since 1937 production and maintenance workers at U.S. Steel have been represented by the United

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[10] Dkt. 140 ¶ 3.

[11] In the collective bargaining agreement signed in 2008 between U.S. Steel and the Steelworkers, the company agreed to pay employees in the Coke plant for an additional 20 minutes a day for wash-up time. (Dkt. 112, App. 390 at ¶ 69).

Steelworkers. Between 1947 and 2003 collective bargaining agreements contained a provision stating that the employer was not obligated to compensate worker "for any travel or walking time or time spent in preparatory and closing activities...." (Dkt. 112-2, p. 5). This provision did not specifically mention time spent donning and doffing clothes or personal safety equipment (to the extent any such equipment was in use in 1947). In 2008, subsequent to the filing of this action, the Steelworkers in connection with the collective bargaining agreement of that year agreed to a statement that the activities which the company was not required to compensate included the "donning and doffing of protective clothing." (*Id.* at ¶ 70). (Dkt. 85-9, p. 3).

The Proceedings Below

Sandifer and several other employees at Gary Works brought this action against U.S. Steel under the Fair Labor Standards Act in federal district court. Approximately 800 other current or former Gary Works employees joined in the putative collective action. The plaintiffs sought backpay for the time spent donning and doffing the PPE and for the time traveling between the locker rooms and work stations.

U.S. Steel moved for summary judgment. The district court granted summary judgment dismissing the donning and doffing claim, but refused to dismiss the travel time claim. In rejecting the donning and

doffing claim, the district court addressed two distinct issues. First, the court held that all of the items of PPE were "clothes" within the meaning of section 203(o). Pet.App. 44a-50a. The district judge construed "clothes" in that provision broadly to mean anything that is a "covering for the human body." Pet.App. 48a (quoting *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 955 (11th Cir. 2007)). Second, the district court ruled that "changing" in section 203(o) does not require that a worker substitute some clothes for other clothes, but includes merely adding something to what the worker is already wearing. Pet.App. 50a-52a. "Even if each employee did nothing more than put the items of PPE over the clothes he or she wore to the plant, adding those items would satisfy the 'change' requirement." Pet.App. 51a. Thus under the district court's interpretation of section 203(o), a worker "chang[es] clothes" if he or she merely puts on, or takes off, a hardhat.

The district court's resolution of the travel time claims turned on the interrelationship between section 203(o) and section 254(a), which provides that a worker must be compensated for time spent traveling between "principal activities." 29 U.S.C. § 254(a). The district court concluded that even though the donning and doffing was in its view non-compensable because of section 203(o), they could still mark the beginning and end of the workday if they were indeed a principal activity. Pet.App. 62a-64a. The district judge rejected U.S. Steel's contention that if the donning and doffing were non-compensable under section 203(o), it necessarily followed that the travel time too

must be non-compensable. Because the court had concluded that whether the donning and doffing constituted a principal activity could only be resolved at trial (Pet.App. 65a-68a), the court declined to dismiss the travel time claim. Pet.App. 79a, 81a.

At the request of U.S. Steel, the district court certified for interlocutory appeal under 28 U.S.C. § 1292(b) his order resolving the summary judgment motion. The district judge identified as the controlling question of law warranting an interlocutory appeal the issue of whether activity which is non-compensable under section 203(o) may nonetheless constitute a principal activity that begins and ends a workday. Pet.App. 21a-33a. The court of appeals accepted the appeal. Pet.App. 2a. Sandifer cross-appealed the district court's holding that the donning and doffing of the PPE is "changing clothes" within the meaning of section 203(o). Pet.App. 2a. The court of appeals concluded that it had no jurisdiction over Sandifer's cross-appeal, but held that the issues raised by that appeal could be considered in U.S. Steel's section 1292(b) appeal, because if (as Sandifer argued) the district court's "ruling on clothes-changing time was erroneous, the plaintiff's case for compensation for travel time [would be] irrefutable." Pet.App. 3a.[12]

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[12] *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996).

The court of appeals concluded that the donning and doffing of the PPE was a principal activity under the FLSA, and thus would ordinarily mark the start and end of the workday. Pet.App. 11a-12a. The appellate court rejected the district court's view that "clothes" includes anything that covers a part of the human body (Pet.App. 7a), but also disagreed with the Ninth Circuit's view that items worn to protect against workplace hazards are not clothes under section 203(o). Pet.App. 10a; *see Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), *aff'd on other grounds sub nom. IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005). Applying yet a third standard, the Seventh Circuit concluded that the safety glasses and earplugs (and perhaps the hardhat) were not "clothes" under section 203(o), but reasoned that the time needed to put on and take off these items was *de minimis* and therefore non-compensable. The other PPE items discussed by the court of appeals, however, were held to be clothes under section 203(o).[13]

With regard to the travel time claim, the Seventh Circuit held that a principal activity that is non-compensable under section 203(o) cannot commence, or prolong, the workday. Pet.App. 11a-20a. Having thus rejected on the merits both of Sandifer's claims, the court of appeals concluded that "the suit has no

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[13] The court of appeals' opinion did not address whether items not worn by its model – the leggings, wristlets, hood, and respirator – were "clothes" within the meaning of section 203(o).

merit and should be dismissed by the district court." Pet.App. 20a.

The court of appeals denied Sandifer's petition for rehearing. Pet.App. 82a.

SUMMARY OF ARGUMENT

The term "clothes" is ambiguous. The district court noted that two editions of the same dictionary provide conflicting definitions of the term, one favorable to the plaintiff and one to the defendant. Although there are some things which everyone would refer to as clothes, such as a shirt made out of ordinary materials, there are items whose categorization in common use cannot be determined from the divergent dictionary definitions. It can be difficult to predict whether or not an English speaker would describe a particular object as clothes, and not everyone necessarily uses this term in the same way.

On the other hand, the term "changing" in the phrase "changing clothes" does have a clearly established meaning. When used in this context, "changing" refers to substituting certain clothes for other clothes. Dictionaries are consistent in explaining that this meaning of the verb "change" (or the gerund "changing") is the correct one when the object of the verb is "clothes." That is important because safety items are often put on over (or in addition to) a worker's clothes, and because there is evidence in this case

that a significant number of workers put the safety items on over their street clothes.

"Clothes" does not mean everything that covers some part of the human body or anything that a person "wears." Applying that overbroad definition, lower courts have reached the implausible conclusion that earplugs, safety glasses and knife scabbards are clothes. People wear all sorts of things which cover some portion of the body, but that are not referred to as clothes, from back braces, barrettes and bandoliers to wigs and wristwatches. If a tourist asked for directions to a clothes store, we would not direct her to an optician, a jewelry store, or a shoe store. Although "clothes" cannot be given a precise definition, an item is more likely to be referred to in that way if its primary purpose is to assure comfort or decency.

The Seventh Circuit erred in suggesting that the meaning of "clothes" could be determined by asking how an English speaker would describe a photograph of a model wearing the item in question. The dispute in this case is about whether an item would or should be described as "clothes" if its purpose is to protect the wearer from a workplace hazard. In a photograph the protective properties and purpose of an item might not be apparent. That is precisely the problem with the Seventh Circuit's photograph. It is impossible to discern from that photograph that the pants and jacket are flame retardant, just as it might be impossible to detect from a photograph that a vest is bulletproof or that a jacket incorporates an air bag to protect a rider who fell off a horse. In determining

whether a protective item would be referred to as clothes, it makes no sense to ask only whether the item would be called clothes by an English speaker who did not know of that protective function.

The term "clothes" in section 203(o) should be interpreted to exclude items that, unlike ordinary clothing, both are used to protect an employee against *workplace* hazards and are designed to provide such protection.

That construction is consistent with what Congress would have had in mind in 1949 when it enacted section 203(o). At that time most American workers who changed clothes at the beginning and end of the day did so because their jobs in mines and factories were dirty. The work clothes that they substituted for their street clothes were ordinary clothing, differing from street clothes (if at all) primarily in durability or color. The sponsor of section 203(o) pointed to bakers as the paradigm of clothes changing. Bakers' clothes differed from street clothes only in that – to assure cleanliness – they were washed and stored at the bakery, and often were white. In that era personal safety equipment was far less common than today.

This interpretation of "clothes" is consistent with this Court's repeated decisions that limitations on the Fair Labor Standards Act should be narrowly construed. The court of appeals erred in holding that this rule of interpretation applies only to provisions codified in section 213, which is headed "exemptions."

This Court's decisions do not hold that the applicability of the narrow construction presumption turns on whether a provision uses the term "exemption." This Court has repeatedly described as exemptions, and applied the presumption in favor of the narrow construction of exemptions to, provisions that did not include the word exemption, but were phrased in other language. If this Court were now to hold that the applicable rule of construction turns on whether or not a limiting provision uses the words "exemption" or "exemptions," such a decision would have far reaching and unpredictable consequences. There are thousands of provisions of the United States Code that use the terms like exemption, exclusion, and exception.

There is no reason to believe Congress intended that a different rule of interpretation would apply to section 203(o) because it was codified in section 203 rather than in section 213. Sections 203 and 213 contain similar types of exceptions, and the suggestion that the sections are subject to different rules of construction is of relatively recent origin.

A distinction between ordinary clothing and items used and designed to provide protection against workplace hazards is consistent with well-established distinctions in the OSHA regulations. Pursuant to those regulations, U.S. Steel and all employers already identify workplace hazards and select the particular items of personal safety equipment that are needed to protect against them.

ARGUMENT

I. The Term "Clothes" In Section 203(o) Is Ambiguous

"Clothes," like "art" or "beauty," is an everyday word whose meaning is clear in some circumstances, but that defies precise definition. "Since 2002, courts have aptly noted the vastly divergent definitions of 'clothes' that appear in a single dictionary, in different editions of a dictionary, and in different publishers' dictionaries...."[14] It would be quite impossible to devise a single formulation that depicts the diverse ways in which people use the term "clothes" or that captures the degree to which speakers may differ about its use.

Several different factors may affect whether a speaker would use the term "clothes" to characterize a particular item. *First*, certain things cover only a portion of the human body that would be covered by ordinary clothing. Thus in this case the wristlet and leggings cover a much smaller area than would a shirt or a pair of pants, respectively. *Second*, some items are worn on the extremities, parts of the body not covered by the apparel (such as shirts or pants) that we most often describe as clothes. Here a majority of the disputed Personal Protective Equipment was

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[14] Wage and Hour Division, Opinion Letter, June 16, 2010, 2010 WL 2468195; *see id.* ("The Administrator shares those concerns about reliance on dictionary definitions of the term 'clothes.'" (footnote omitted)).

worn on the extremities. The hardhat, snood, hood, hearing protection, safety glasses and respirator were on the head or face, the gloves were on the hands, and the metatarsal boots were on the feet. *Third*, although what we refer to as clothes is at least usually made of cloth (*e.g.*, cotton, wool, or artificial fabrics), people also wear items made of other substances. In the instant case the various PPE were made of hardened plastic (the hardhat and the safety glasses), rubber (the earplugs), Kevlar (the wristlets and leggings), leather and metal (the boots), a combination of metal and other materials (the respirator), and some heavy material infused with an unidentified chemical that reduced its tendency to burn (the fire retardant pants and jacket). *Fourth*, while at least the primary purposes of ordinary clothes are modesty and comfort, perhaps with an element of fashion determining form or color, some things we wear are intended to serve a different function, and covering the body is only an incidental consequence. The purpose of an item may be purely decorative (a necklace), religious (a cross or yarmulke), functional (suspenders), informational (a watch), medical (a neck brace), symbolic (a team mascot costume), or protective (a helmet). In this case all of the PPE items were intended to protect the wearer from injury or death.

Whether a particular speaker would describe a particular item as "clothes" might turn as well on whether some other word seemed more appropriate instead. In ordinary use, for example, "clothes" and

"accessories" are distinct; clothes and accessories are usually sold in separate departments of a store or at different parts of a retailer's website. But the line separating what a speaker would call "clothes" rather than an "accessory" is not that precise.

People do not all use the term "clothes" in the identical manner. A steelworker in Gary might use the term "clothes" differently than a sales associate at Forever 21 or the fashion editor at GQ. A teenager might refer to something as "clothes" which his or her parents would emphatically describe in different terms. Whether or not a speaker would refer to chaps as "clothes" could depend on whether she was a native of Arizona or of the Bronx. And usage to some degree has probably evolved over time. The statute in this case was written more than sixty years ago, in an era when lawmakers purchased what were then known as "furnishings" from the now long-shuttered Raleigh Haberdashers, and when some people of means still changed clothes when they "dressed for dinner" at home, a practice that today is largely unfamiliar except to fans of Downton Abbey.

All of this, unsurprisingly, has led to divergent dictionary definitions of "clothes." In the courts below U.S. Steel relied on Webster's Third New International Dictionary (1986), which arguably defines "clothes" quite broadly as "covering for the human body." *Id.* at 428; *see* Pet.App. 48a. Sandifer, on the other hand, invoked Webster's Second New International Dictionary (1957), which defines clothes

far more narrowly as items "worn ... for decency or comfort." *Id.* at 507; *see* Pet.App. 46a. These (and other) dueling dictionary definitions make clear only that dictionaries themselves cannot provide a definitive resolution of the meaning of "clothes" in section 203(o).

II. The Term "Changing" In Section 203(o) Unambiguously Refers To The Substitution Of Clothes for Other Clothes

Unlike the term "clothes" in section 203(o), the term "changing" has a clear and well-established meaning when the object of the gerund "changing" is the noun "clothes."[15] The phrase "changing clothes" is a common idiom that refers to substituting certain clothes for others, not to merely putting on something else. The distinction is important because most safety items – regardless of whether classified as "clothes" under section 203(o) – are put on over a worker's street clothes.[16] That limitation on

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[15] Although the lower courts occasionally describe section 203(o) as applying to the "donning" and "doffing" clothes (*e.g.*, Pet.App. 12a, 48a), the text of the statute actually refers to time spent in "changing" clothes. The difference is critical, because one could "don" an item without substituting it for anything else. A gentleman who doffs his hat at an acquaintance momentarily takes it off, then returns it to his head.

[16] Wage and Hour Division, Opinion Letter, Dec. 3, 1997, 1997 WL 998048 ("protective safety equipment ... is generally worn over ... apparel"); *Bejil v. Ethicon, Inc.*, 269 F.3d 477, 478

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the scope of section 203(o) also sheds light on the proper interpretation of the term "clothes."

When used with regard to clothes, "changing" emphatically refers to substitution.

> 'Changing clothes' is an everyday, plain-language term that describes what most people do every day – taking off pajamas to put on work clothes in the morning, or taking off dress clothes to put on casual wear in the evening.... All of the sanitary and protective gear at issue here is worn over, and in addition to, the employees' street clothes.

Fox v. Tyson Foods, Inc., 2002 WL 32987224 at *6 (N.D.Ala. Feb. 4, 2002). Any school child knows that "change your clothes" does not mean "put on your coat." "Change clothes" is an idiomatic expression like "change a diaper" or "change a tire." No one understands the sentence "the father changed the baby's diaper" to mean that the father put a second diaper on top of the first smelly one, or took off the full diaper and left the baby naked.

With regard to the meaning of "change" in the context of clothes, dictionaries are completely consistent. In definitions of "change," every reference to clothes concerns substitution. Substitute is one of the various meanings of "change," and substituting

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(5th Cir. 2001) (noting that items worn for sanitation reasons were worn "over street clothing").

certain clothes for others is the most common example found in dictionaries for that particular meaning of change. One dictionary defines change as "to put or take (a thing) in place of something else; substitute: as, he *changed* his clothes" Webster's New World Dictionary of the American Language: The Everyday Encyclopedic Edition 124 (1966) (emphasis in original). "When you change or change your clothes, you take off some or all of your clothes and put on different ones, [e.g.] ... *She changed into the working clothes she had brought with her.*" Collins Cobuild English Language Dictionary, 226 (1987) (emphasis in original).[17] The analogous intransitive form of the

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[17] The American Heritage Dictionary of the English Language, 319 (3rd ed. 1992) (defining change as "[t]o put on other clothing: *We changed for dinner*") (emphasis in original); The American Heritage Dictionary: Second College Edition, 258 (1982) ("[t]o put fresh clothes on"); The Illustrated Heritage Dictionary and Information Book, 224 (1977) ("[t]o put fresh clothes on"); II The Oxford English Dictionary, vol. C, 268 (1933) ("[t]o put or take another or others instead of; to substitute another...."; 1622 Bible, *Gen. xli* 14 "He shaued himself, and changed his raiment.... [*t*]*o change oneself: i.e.* one's clothes"); Encarta World English Dictionary, 304 (1999) ("to remove clothes and put on others") (capitalization and bold omitted); The Oxford Encyclopedic English Dictionary, 246 (1991) ("put fresh clothes ... on (... *changed into something loose*")); Funk & Wagnalls Standard Dictionary of the English Language International Edition, 222 (1966) ("[t]o put other garments, coverings, etc., on; to *change* the bed"); Webster's II New Riverside University Dictionary 248 (1984) ("[t]o put fresh clothes or coverings on [:] *change* a baby's diapers"); Collins English Dictionary, 268 (4th ed. 1998) ("to put on other clothes"); I Funk & Wagnalls Standard Dictionary of the English Language, 317 (1903) ("[t]o exchange

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verb change (*e.g.*, she came home from work and changed) also refers to substituting certain clothes for others.[18] The United States Department of Labor's 1965 Glossary of Current Industrial Relations and Wage Terms explained that "clothes changing time" means "[t]ime allotted within the paid workday for changing from street wear to working clothes or from working clothes to street wear, or both." 14 (1965).

That common usage is reflected in decisions from the era when section 203(o) was enacted.[19] In *In re Continental Baking Co.*, 18 War Labor Rep. 470 (Regional Bd. II 1944), the Regional Board ordered "payment for time spent in changing clothes." *Id.* at 470; *see id.* at 472 ("[t]he directive order in this case

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for something else; replace by substitution; as ... to *change* one's dress.... We *change* our clothes whenever we put on others").

[18] Webster's Third International Dictionary 374 ("to disrobe and rearray oneself more suitably esp. in clothes suitable for a social or formal occasion"); 1 Shorter Oxford English Dictionary on Historical Principles, 379 (2002) ("change one's clothes, *spec.* change into evening dress"); The American Heritage Dictionary: Second College Edition, 258 (1982) ("[t]o put on other clothing").

[19] *See Alberts v. Porter*, 10 Lab. Cas. ¶ 62,809 at 68,213 (N.D.Ill 1945) (employees entitled to compensation for time spent "changing their clothes" when they "changed from their street clothes into their uniforms"); Bureau of National Affairs, Wage and Hour Division Manual, 247 (1945) (Wage and Hour Division release R-1739 reaffirmed the WHD position that "time spent in changing clothes by employees who are required – either by their employer, by state or local statute, by the particular nature of the work, or by any other factor – to change to and from working clothes on the premises, should be considered hours worked").

directs that payment be made to bakery workers for time spent in changing clothes") (Zeller, Member, dissenting). The Board's explanation of the facts made clear that the bakers were replacing their street clothes with clean clothes, not simply putting aprons on over their street clothes.[20] Similarly, in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 682 (1946), this Court explained that adjacent to the plant entrance were "cloak and rest rooms where employees may change to their working clothes and place their street clothes in lockers." *After* having changed clothes, the employees proceeded to their places of work where they would "perform various preliminary duties, such as putting on aprons and overalls [and] removing shirts." *Id.* at 683. The Court used the term "change" to refer only to the substitution of working clothes to street clothes, not to the addition of aprons and overalls over their work clothes.

A number of lower courts have mistakenly held that "changing clothes" includes merely adding an item to what a worker is already wearing.

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[20] 18 War Labor Rep. at 471:

> As an incident of their employment, the[ ] [employees] are required to wear clothing made of a washable material which must be kept clean at all times and which may be worn only when they are at work. As a consequence of the latter requirement, the employees may not change to and from their working clothes at their homes, but must do so upon the company's premises; indeed, they are specifically prohibited from wearing in the baking room the clothing they have previously worn on the street.

> The definition of 'change' is ... broad. It means 'to make different,' that is 'to modify in some particular way but short of conversion into something else'.... Nothing in the statute's language suggests that its application turns on whether one must fully disrobe or exchange one shirt, for example, for another.... [O]ne need not exchange clothes to change clothes for the purpose of applying section 203(o).

Anderson v. Cagle's, Inc., 488 F.3d at 956 (quoting Webster's Third International Dictionary 373 (1986)).[21] The district court interpreted "changing" in this manner. "Even if each employee did nothing more than put the items of PPE over the clothes he or she wore to the plant, adding those items would satisfy the 'change' requirement." Pet.App. 51a. In the court of appeals the defendant argued that under section 203(o) a worker changes clothes simply by putting on anything new.[22] But if glasses are clothes, and

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[21] *See Sepulveda*, 591 F.3d 216 ("To 'change' means 'to make different,' that is 'to modify in some particular way but short of conversion to something else.' Webster's [Third International Dictionary at] 373.... The employees contend ... that the term 'changing' requires the exchange or substitution of one item for another. In their view, simply layering protective gear on top of one's clothes does not count as 'changing.' We reject this narrow definition.... Rather, one can also change something by modifying it. Accordingly, the employees' act of donning and doffing their equipment [over their street clothes] fits comfortably within the meaning of 'changing.'").

[22] Reply/Response Brief of Defendant-Appellant, 23-25.

"changing" is not limited to substitution, then the Chief Justice changes clothes in open court whenever he puts on or takes off his glasses. No member of this Court would describe in that manner the events that occur during oral argument.

That "changing clothes" means substituting clothes is important in the instant case, because there is substantial record evidence that many of the employees in fact put their flame retardant jackets and pants on over their street clothes, rather than first removing those street clothes. (*See* p. 9 n.9, *supra*). The meaning of the term "changing" also strongly supports the conclusion that "clothes" does not refer to safety equipment. The limited safety equipment that existed when section 203(o) was enacted in 1949, such as welder's helmets or meat cutter belly guards, were put on over a worker's clothes; generally only ordinary work clothing – differing from street clothes, if at all, only in color (dark in factories, white in bakeries) or durability (*e.g.*, blue jeans) – would have been put on in place of street clothes.

III. Not Every Item That Covers Some Part of The Body Is "Clothes"

A number of lower courts have held that every item which covers any portion of the human body is "clothes." That simple definition is palpably overbroad.

The Fourth Circuit interprets "clothes" in this sweeping manner. "A leading dictionary defines 'clothes' as 'clothing,' which in turn is defined as 'covering for the human body or garments in general ...'.... [T]the items which are at issue here ... [a]ll ... serve as 'covering.'" *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 214-15 (4th Cir. 2009) (quoting Webster's Third New International Dictionary 428 (unabridged) (1986)).[23] Because anything a person wears necessarily covers the portion of the body on which it is worn, the Tenth Circuit holds that everything "worn by a person" is clothes. *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1139 (10th Cir. 2011) (quoting Webster's Third New International Dictionary 428 (unabridged) (1986)). Stringing together several definitions, the Eleventh Circuit holds that all accessories are clothes.[24] In the court below U.S. Steel urged the Seventh Circuit to adopt this interpretation of the term "clothes."[25]

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[23] *See Franklin v. Kellogg Co.*, 619 F.3d 604, 614 (6th Cir. 2010); *Bejil v. Ethicon, Inc.*, 269 F.3d 477, 480 n.3 (5th Cir. 2001).

[24] "The dictionary defines 'clothes' as 'clothing,' which itself is defined as 'covering for the human body or garments in general: all the garments and accessories worn by a person at any one time.'" *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 955 (11th Cir. 2007) (quoting Webster's Third New International Dictionary 428 (unabridged) (1986)).

[25] Reply/Response Brief of Defendant-Appellant/Cross-Appellee United States Steel Corp., 7, 12, 13, 14, 19, 20, 21.

Applying this sweeping definition, some lower courts in section 203(o) cases have reached conclusions that would undoubtedly surprise at least most English speakers. The Fourth, Sixth and Tenth Circuits have held, for example, that earplugs and safety glasses are clothes. "[G]oggles[and] ear plugs ... are ... clothes within the meaning of § 203(o) [because] [e]ach of these items provides covering for the body." *Franklin v. Kellogg Co.*, 619 F.3d 604, 614 (6th Cir. 2010).[26] Indeed, the protective items that have most frequently been held to be clothes in section 203(o) cases include safety glasses and earplugs.[27] The Tenth Circuit insists that a knife holder is clothes, explaining that knife holders are "quite similar to ordinary ... holsters." *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1140 (10th Cir. 2011). The Fifth Circuit pointedly remarked that it would be "nonsensical" to deny that a beard holder is clothes. *Bejil v. Ethicon*, 269 F.3d 477, 480 n.3 (5th Cir. 2001). In the court below defendant argued that under this standard "harnesses[ ] [and] respirators ... would ... fit within the definition of 'clothes.'"[28]

Those implausible conclusions demonstrate the palpable overbreadth of defining clothes as anything

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[26] *Salazar v. Butterball, LLC*, 644 F.3d at 1134, 1140; *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d at 215.

[27] A list of decisions holding that safety glasses or earplugs are "clothes" is set out in an appendix to the brief.

[28] Reply Response Brief of Defendant-Appellant/Cross-Appellee United States Steel Corp., 17 n.3.

that covers the body, or that a person wears. Such a sweeping interpretation of the term clothes "would embrace any conceivable matter that might adorn the human body, including metal mesh leggings, armor, spacesuits, riot gear, or mascot costumes." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003). Other than some lawyers and judges in section 203(o) cases, virtually no one calls harnesses, respirators, earplugs or safety glasses "clothes." A sign mislabeling a respirator as "clothes" would be likely to be reproduced in one of the humorous Signspotter books collecting photographs of misused words.

The Seventh Circuit correctly acknowledged "not everything a person wears is clothing." (Pet.App. 7a). People wear scores of things, all of which cover some portion of the body, that are not referred to as "clothes," from back braces, barrettes and bandoliers to wigs and wristwatches.[2] When an informant wears a wire, the electronic equipment covers part of his body, but no one would call the microphone and

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[2] *E.g.*, bandages, bicycle helmets, Bluetooths, bracelets, brass knuckles, casts, catcher's masks, contact lenses, corsages, earbuds, earrings, elbow pads, eyepatches, falls, fake beards or mustaches, false eyelashes, fanny packs, fencer's masks, football helmets, football shoulder pads, gas masks, eye glasses, goalie masks, gun belts, hair pins, hair clips, hearing aids, knee braces, knee pads, lacrosse arm guards, leg braces, life jackets, medals, motorcycle helmets, motorcyclist body armor, neck braces, necklaces, nicotine patches, night vision goggles, pocket protectors, post-surgical boots, press-on nails, prosthetic limbs, rings, shin guards, slings, surgical masks, tennis sweatbands, tiaras, toupees, and visors.

transmitter "clothes." If tourists asked for directions to a clothes store, we would not direct them to an optician, a jewelry store, a shoe store, or a beauty supply store. The shirts, blouses, pants, skirts and dresses that are sold at J.C. Penney's or Nordstrom's would certainly be described as clothes. But as the court below acknowledged (Pet.App. 6a), safety goggles and earplugs are not referred to as clothes. The overly broad "covering for the body" or "items ... worn by a person" standard is not a plausible interpretation of "clothes," because it encompasses not only goggles and earplugs, but also countless other things that are to be found at a Home Depot or at a Sears Roebuck in the tools department, rather than in the men's or women's clothing departments.

This manifestly overly broad account of the meaning of "clothes" derives from an incautious use of a dictionary definition. Dictionaries can often provide only a rough account of how a word is used, not the sort of precise, prescriptive definitions to be found in a plane geometry text book. Dictionaries may be helpful in interpreting statutes, but they should not be used as if courts were translating some unfamiliar foreign language. The definitions of only a few words are exact (*e.g.*, rectangle). Most dictionary definitions are attempts to capture in a handful of words all the complexities of the ways in which a particular term may be used by hundreds of millions of English speakers. Unavoidably those efforts often result in definitions that are somewhat overinclusive or underinclusive, which is why in this case, as in others,

there are inconsistencies among the definitions found in different dictionaries. *Compare Kasten v. Saint-Gobain Performance Plastics*, 131 S.Ct. 1325, 1331 (majority opinion) *with id.* at 1337 (Scalia, J., dissenting) (2011). Certainly when various dictionaries offer divergent definitions of a term, a court may not simply pick the one it prefers and declare the meaning clear and obvious.

With regard to the meaning of "clothes," the pattern of prevailing usage of that term is better[30] captured by the longer definition in the edition of Webster's International Dictionary that was in print at the time section 203(o) was adopted: "covering for the human body; vestments; venture; a general term for whatever covering is worn, or is made to be worn, *for decency or comfort*." Webster's Second New International Dictionary, 507 (1948) (emphasis added); *see* Cambridge Dictionary of American English, 153 (2d ed. 2008) ("things you wear to cover your body and

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[30] Ordinary usage is too complex to be precisely captured in this or any other formulation. A person alighting from a shower might wrap up in a towel, for warmth and modesty, yet few people would call the towel clothes. Conversely, a person on a warm day might wear a sweater over a shirt or blouse, not for modesty (the shirt or blouse sufficed) or comfort (quite the opposite), but just because it looked nice. In that circumstance most people would still refer to the sweater as clothes. Gloves or a hat may be worn for comfort on a cold day, but they are not usually described as clothes. A stylish hat or gloves would probably be called an accessory rather than clothes, while work gloves or a hardhat would probably not be called either. Shoes and boots are in a category of their own.

keep you warm, to be comfortable, or for the way they make you look"); Aileen Ribiero, The Art of Dress: Fashion in England and France 1750-1820, 3 (1995)") ("Clothes ... defend us 'from the inclemencies and vicissitudes of climate and season, and hide those parts which delicacy and the interests of society require to be hidden") (quoting unidentified philosopher). If the primary purpose of a particular item is not to provide "decency or comfort," it is less likely to be referred to as clothes.

IV. The Seventh Circuit Standard Is Neither Sound Nor Administrable

(1) The Seventh Circuit, correctly rejecting the "any covering for the body" standard, used a demonstration to delineate the meaning of "clothes" in section 203(o). The court had a model put on some of the protective items in the box of exhibits, not including the respirator, hearing protection, wristlets or leggings. A photograph was taken of the model and included in the court of appeals' opinion. Pet.App. 5a. The Seventh Circuit then insisted that "[a]lmost any English speaker would say that the model in our photo is wearing work clothes." Pet.App. 7a. This method of determining the meaning of "clothes" is neither accurate nor judicially administrable.

What divides the courts of appeals, and the parties, is whether an item worn by a worker is "clothes" within the meaning of section 203(o) if that item is designed and used to protect against a workplace

hazard. Nothing in the Seventh Circuit's photograph, however, reveals that the jacket and pants are flame retardant, to protect against molten metal and sparks, or that the boots (if "clothes" at all) have metal toe boxes to protect against heavy falling objects. Judge Posner emphasized that "a picture is worth a thousand words" (Pet.App. 4a); but the words this picture conveys do not include "flame retardant" or "steel-toed." The appellate court's photograph demonstration merely points out that English speakers would call pants "clothes" if they did not know that that item was flame retardant or had other properties to protect against workplace hazards. That tells us nothing at all about how the question that matters, which is how English speakers would describe an item if they actually knew that it had special protective properties. In addition, the Seventh Circuit model in the photograph put on only some of the items in the box of exhibits, not donning the wristlets, the leggings, the earplugs or the respirator. An English speaker who saw a photograph of a model wearing *all* of this gear would have realized that a worker using it needed protection from an unusually dangerous environment, and might for that reason have been less likely to describe the outfit (or any of its components) as mere "work clothes."

The function of something worn by an individual is certainly relevant to whether an English speaker would call it "clothes," regardless of whether that

characteristic would be apparent from a photograph.[31] There is an important difference between a down vest and a bulletproof vest; certainly many English speakers would not call a bulletproof vest "clothes." A vest worn by bomb squads, or a flak jacket used by soldiers, might be distinguishable in a photograph from a down vest; if so, an English-speaking viewer might not call the bulletproof vest or a flak jacket "clothes." On the other hand, some bulletproof vests are designed to *look* like ordinary vests, with fashionable tailoring and buttons down the front, perhaps for the very purpose of disguising the fact that the person wearing it is a law enforcement officer.[32] Surely whether an English speaker would call a bulletproof vest "clothes" would not turn on how stylish it is.

An English speaker who had complete information might avoid using the term "clothes" to characterize bulletproof pants[33] or radiation-proof lead lined

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[31] Probably only a muggle, unaware of the item's unusual function, would refer to Harry Potter's cloak of invisibility as "clothes."

[32] *See* http://www.bulletproof-vest.biz/bulletproof-vest-bullet-and-stab-proof-jackets-body-armour-nij-iiia-black-p-58.html, visited May 8, 2013.

[33] *See* http://www.bluedefense.com/body-armor/bullet-proof-pants-3a.html visited May 4, 2013 ("Originally developed as part of our bomb squad offerings, these Kevlar pants will save you from most bomb threats including hand grenades, pipe bombs, C4 explosive, and anything else under the 3A umbrella (.357, 9mm, .40 cal)").

underpants[34], even though those protective properties and functions are not apparent in a photograph. Some equestrians wear airbag vests or jackets; in a photograph they look much like ordinary vests or jackets, but if a rider is thrown from a horse the device instantly inflates, protecting the arms, elbows and spine.[35] An English speaker who only saw a photograph of a person wearing this safety device would probably call the vest or jacket "clothes," but might not do so if the operation and purpose of the device were revealed.

Similarly, it is at least uncommon to refer to medical devices worn on the person as clothes. Certainly it would be surprising if any English speaker used that term for a plaster cast or a post-surgical boot. Although these items look unlike ordinary clothes, the medical function of some other items would not be readily apparent. For example, victims of severe burns must wear burn pressure garments to avoid deformities, reduce scarring and ensure joint movement; those garments must be worn 24 hours a day for twelve to eighteen months. Although some variants of this device look quite unusual, a burn pressure garment to treat burns of the torso could

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[34] *See* http://www.drct/com/dss/lead/leadwear.html, visited May 3, 2013 ("The Radiation Guard [underpants] stop[ ] more than 99% of the Palladium radiation and 95% of the Iodine radiation").

[35] *See* http://www.air-vest.com/category/EquestrianAirbagJacket.html, visited May 6, 2013.

resemble some sort of ordinary clothing. An English speaker (other than a doctor or a nurse) who saw these items in a photograph, or even in person, might call them "clothes" unless informed of their purpose and function.

In at least some circumstances, probably most, whether an English speaker would describe something as "clothes" would be influenced, perhaps decisively, by knowledge that the item was designed and used to protect the wearer from hazards such as bullets, spinal fractures, burn scarring or molten metal.[16] The court of appeals erred in basing the determination of whether an item is "clothes" on a demonstration in which the protective properties of the item were not revealed.

(2) If this Court holds that an item can constitute "clothes" under section 203(o) even if intended to protect against workplace hazards, it will be necessary to fashion some other standard for determining which protective items are and are not "clothes." That would be a vexingly difficult task, in part because

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[16] Perhaps the hypothetical English speaker might also be influenced by the degree to which the item at least *appeared* to be ordinary clothing, even though it was not. Today the flame retardant apparel at U.S. Steel is a heavy fabric infused with a flame retardant chemical; but tomorrow, because of new knowledge about comparative effectiveness (or, perhaps, about side effects of that chemical), steel mills might instead have workers use apparel that looks far less like ordinary clothing, such as an aluminized jump suit.

popular usage of the term "clothes" is so complex and variable.

The Seventh Circuit opinion offers no meaningful standard. An item is not "clothes," that court held, if it is "not clothing in the ordinary sense." Pet.App. 6a. Conversely, an item is "clothes" if "[a]lmost any English speaker would say that [the object] is ... clothes." Pet.App. 7a. These truisms are entirely unhelpful. *Whether* English speakers would or would not describe a particular item as "clothes" is the very question at issue, or at least a key part of the answer.

The court of appeals' classification of the various items it considered is simply unexplained. It held (correctly in our view) that "[safety] glasses and ear plugs are not clothing in the ordinary sense" (Pet.App. 6a), but did not say why that was so. Regarding a hardhat, the Seventh Circuit could not make up its mind, commenting that a "hard hat *might* be regarded as an article of clothing." *Id.* (emphasis in original). The boots, gloves and snood, the appellate court observed, "*seem*[ ] to be clothing," (Pet.App. 6a) (emphasis in original), ultimately concluding that they are clothes, but offered no explanation for that conclusion. The court of appeals said nothing at all about the other protective gear in the box of exhibits, the wristlets, leggings, and respirator. The court's statement that "[a]lmost any English speaker would say that the model in our photo is wearing work clothes" (Pet.App. 7a) does not mean that the Seventh Circuit believed that everything worn by the model would be called clothes, because

the appellate court held that at least one of the things the model is wearing – safety glasses – is not clothes. Nothing in this series of *ipse dixits* remotely resembles any sort of legal standard.

It certainly is not the case that "[a]lmost any English speaker would say" that boots are "clothes." No one refers to a Rockport or Mephisto shop as a "clothes store." In the large department stores, shirts, blouses, pants, skirts and dresses are in the "clothes," "clothing" or "apparel" departments, while shoes and fashionable boots (but perhaps not work boots) are in the shoe department. Gloves are invariably in the accessory department, not in clothing or apparel. That same pattern of classification prevails on the websites of on-line retailers. The only major department store that sells hardhats, respirators and safety glasses appears to be Sears Roebuck, but those items (like work gloves) are sold in the tools or gardening departments, not in men's or women's clothing.

"Almost any English speaker" would probably be unsure what to make of the snood, the wristlet and the leggings. These items simply do not resemble any object – clothing or otherwise – most people have ever seen. If asked to put on the "leggings" at issue, few people would have any idea how or on what part of the body to do so, especially if not given the hint implicit in the name "leggings." Telling someone that the wristlet is called a "wristlet" would probably add to the confusion, because much of that item is worn over the forearm, not the wrist. (A doctor or nurse might think it was a tubular compression bandage).

Only some Navy and Coast Guard veterans, or an afficiando of medieval chain mail armor, would ever have seen anything like the snood, and to them it would resemble an item used for protection in battle. If asked whether these items were "clothes," "accessories," or neither, many English speakers might respond that they simply had no idea. Particularly with regard to these objects at least, "would most English speakers call it clothes?" is not a viable legal standard, because judges would have no reliable way of knowing the answer.

Absent any clear definition of "clothes," the lower courts have at times floundered. In the instant case the district court quoted with approval a decision holding that it would be "nonsensical" to define "clothes" to exclude hair and beard nets (Pet.App. 49a), and then on the next page quoted a different decision which said precisely the opposite. Pet.App. 50a (("[h]air nets and beard nets ... are not generally considered 'clothes'") (quoting *Kassa v. Kerry, Inc.*, 487 F.Supp.2d 1063, 1067 n.1 (D.Minn. 2007)). Regarding jump suits and space suits, the district judge ventured equivocally that the former "is probably clothing" while the latter "is probably not clothing." Pet.App. 48a. (quoting *Kassa*, 487 F.Supp.2d at 1067). Evincing surprisingly emphatic certainty, the Tenth Circuit insisted that plastic sleeves (worn by workers at a turkey processing plant) "would in other contexts (such as if worn on the street), obviously be considered clothes." *Salazar v. Butterball, LLC*, 644 F.3d at 1139. But no one wears on the street plastic (or other

types of) sleeves unconnected to a shirt or blouse, and the only thing such a device would "obviously be considered" if worn on the street is strange. The same court commented that a poultry processor's steel mesh (*i.e.*, chain mail) gloves "are quite similar to ordinary gloves." 644 F.3d at 1140. That has not been true since the thirteenth century.

There are a few things that everyone calls clothes, such as a shirt or blouse made out of ordinary fabric. If, as the Seventh Circuit suggested, the composition and function of an object is legally irrelevant under section 203(o), then flame retardant, bulletproof and lead pants would be "clothes" under the statute. But the vast majority of the things at issue in section 203(o) cases are either items that the public does not refer to as clothes (such as safety glasses, boots, earplugs, or respirators) or items whose characterization by the public would be difficult to predict (such as snoods, wristlets and leggings). The Seventh Circuit opinion does not articulate any rule at all for deciding these cases, and does not provide employers with a predictable standard that they could use to determine their responsibilities under the FLSA.

V. "Clothes" In Section 203(o) Should Be Interpreted To Exclude Items That Are Used To Protect Against Workplace Hazards and Were Designed To Provide Such Protection

The term "clothes" in section 203(o) should be interpreted to exclude items that, unlike ordinary clothing, both are used to protect employees against workplace hazards and were designed to provide such protection.

There are three possible rules regarding when such personal protective items are "clothes" within the meaning of section 203(o): always, sometimes, and never. Several circuits hold that such protective equipment is always "clothes," reasoning that everything a worker wears is clothes. But that standard leads to the implausible conclusion that things such as earplugs and safety goggles are clothes. The Seventh Circuit holds that such equipment is sometimes clothes, but that circuit fails to articulate a plausible and administrable standard regarding when personal protective items are and are not clothes. The correct approach is the third alternative: personal protective equipment used to protect employees against workplace hazards and designed to provide such protection is never clothes within the meaning of section 203(o).

Protective equipment of that sort is not what Congress would have had in mind when it enacted Section 203(o) in 1949. That interpretation is consistent with patterns of current usage, which tends

not to refer to protective items as "clothes." This construction is congruent with the OSHA regulations regarding personal protective equipment, which provide an already established body of law that distinguishes such protective equipment from ordinary clothing.

A. The Clothes That Congress Would Have Had In Mind When It Enacted Section 203(o) Were Ordinary Apparel

"The 'clothes' that Congress had in mind when it adopted section 203(o) in 1949 – those 'clothes' that workers in the bakery industry changed into and 'took off' in the 1940s – hardly resemble the modern-day protective equipment commonly donned and doffed by workers in ... industries where protective equipment is required by law, the employer, or the nature of the job." Wage and Hour Division, Opinion Letter, Dec. 3, 1997, 1997 WL 998048. Sixty years ago personal safety equipment was relatively uncommon, and nothing like the elaborate protective equipment which employers have required since the 1970 adoption of the Occupational Safety and Health Act.

In the middle of the twentieth century workers most often changed clothes at the beginning and end of the day because the work environment was dirty. Miners usually emerged from the mines covered in grit, "begrimed and exhausted by their continuous physical ... exertion." *Jewel Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 166

(1945). Factories could be as dirty, or worse. In the plant at issue in *Steiner v. Mitchell*, 350 U.S. 247 (1956), "the chemicals permeate[d] the entire plant and everything and everyone in it.... [E]ven the families of ... workers may be placed in some danger if ... particles are brought home in the workers' clothing or shoes." 350 U.S. at 249-50. At the end of the day workers frequently needed to get out of the filthy clothes in which they had worked, shower, and put on other clothing. Often workers met that need by wearing street clothes to the mine or factory, changing into work clothes, then at the end of the day removing their work clothes, washing up and changing back to their street clothes. In *Steiner* "employees regularly change[d] into work clothes before the beginning of the productive work period, and shower[ed] and change[d] back at the end of that period." 350 U.S. at 251. The clothes worn by mine and factory workers had no protective properties, although they were often dark in color (because of the dirt) and strongly made (to withstand the rigors of the job.) The Sears Roebuck catalogue for Spring Summer 1949 assured customers that its "Hercules" brand outfits "ha[d] been work-proved by thousands," were "famous for long wear and strength," "stand[ ] up to hard service" and "[t]ake[ ] toughest work." *Id.* at 369, 376. "They've got what it takes for grueling work." *Id.* at 368. Buyers were reminded that "[d]ark colors won't show soil; ideal for dirty or greasy jobs." *Id.* at 375.

Bakery employees often changed clothes before and after work, but for different reasons. A number of states laws, adopted to assure the safety of food, required that bakery employees wear on the job only garments that had not been worn on the street.[37] Where those laws did not exist, at least some bakeries followed the same practice out of concern for the public. Here too the work clothes donned and doffed at the beginning and end of the day had no protective function, but just needed to be clean. Often those work clothes were white, so that any dirt would be visible. Representative Herter, the original proponent of the proposal that became section 203(o), specifically pointed to the clothes-changing of bakery workers as the paradigm to which his legislation was addressed.[38]

At the time section 203(o) was adopted, on the other hand, personal safety equipment was relatively uncommon. There were at that time few laws

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[37] *In re Continental Baking Co.*, 18 War Labor Rep. 470 (Regional Bd. II 1944) described the typical situation.

> As an incident of their employment, [employees] are required to wear clothing of a washable material which must be kept clean at all times and which may be worn only when they are at work. As a consequence of the latter requirement, the employees may not change to and from their working clothes at their homes, but must do so upon the company's premises; indeed, they are specifically prohibited from wearing in the baking room the clothing they have previously worn on the street.

[38] 95 Cong. Rec. 11210 (Aug. 10, 1949).

regulating on-the-job safety, some of the risks were not fully appreciated, and unions were only beginning to add safety to the list of working conditions about which they negotiated. Hardhats, ubiquitous today, did not come into widespread use until the 1960s.[39] Sears Roebuck, which now sells an enormous variety of hardhats, did not include a single one in its 1949 catalogue. Kevlar, an essential component in many modern safety products, was only invented in 1965.[40] The most familiar safety device used by workers in 1949 was probably a welder's helmet; Sears marketed it in the tools section of its catalogues, not under clothing or hats. It is exceedingly unlikely that anyone in 1949 would have described putting on a welder's helmet as "changing clothes."

To the extent that personal safety equipment did exist, it was regarded as quite distinct from clothes. The difference is repeatedly reflected in a 1945 decision of the War Labor Board regarding the meat packing industry. *In re Swift & Co.*, 21 War Labor Rep. 652 (1945). The union which then represented meat packers asked the Board to require the nation's four major meat packers to reimburse workers for the cost of specialized clothing, tools, and safety items. The Board's order in favor of the union repeatedly and expressly distinguished between clothes on the

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[39] *See* http://www.bullard.com/V3/products/head_face/head_protection/Hard_Hat_History/, visited May 11, 2013.

[40] *See* http://www2.dupont.com/Phoenix_Heritage/en_US/1965_a_detail.html, visited May 11, 2013.

one hand and safety equipment on the other. "The companies are directed to supply the employees with (a) all special purpose outer working garments and equipment peculiar to the industry which, because of the nature of the work or the requirements of the meat inspection regulations, it is necessary for the employees to wear while performing their work; and (b) all safety and protective devices, and all tools and equipment necessary for the work and not now furnished by the companies" 21 War Labor Rep. at 655; *see id.* at 711 (same), 725 (same), 733. "Our recommendation regarding work clothing is limited to outer working garments, such as smocks, overalls, frocks, uniforms, boots, rubbers, leather aprons, raincoats, and gloves.... Our recommendation with regard to tools includes ... metal guards, and other protective and safety equipment." *Id.* at 673; *see id.* at 672.

B. Prevailing Usage Refers To Protective Apparel As "Clothing" Not "Clothes"

There is evidence that English speakers generally, although not invariably, use the noun "clothing," rather than "clothes," when an item of apparel is protective in nature.

In some contexts "clothes" and "clothing" are used interchangeably. For example, in the New York Times and in opinions on Westlaw, the phrases "work clothes" and "work clothing" are both common; "work clothes" is used substantially more often than "work

clothing."[41] However, when the adjective "work" is replaced with the adjective "protective," usage is dramatically different. The New York Times has used the phrase "protective clothing" 1480 times, but utilized "work clothes" in only 51 instances. In opinions on Westlaw, "protective clothing" appears in 1242 cases, while "protective clothes" is in only 27 cases.[42] The phrase "protective clothes" is not to be found in any federal judicial decision prior to 1987[43], although before that date "protective clothing" had been used in 133 different opinions. The lower courts in this very case, although insisting that protective items are "clothes," always use the phrase "protective clothing" (some 16 times) but never "protective clothes"; conversely, those decisions use the phrase "work clothes" (26 times) far more often than "work clothing" (once). That difference may reflect a tendency to associate "clothes" primarily with ordinary, everyday items. Whatever the source of this distinction in usage, it suggests that protective items were not what Congress had in mind when it used the term "clothes" – not "clothing" – in section 203(o). *See* Wage and Hour Division, Opinion Letter, Dec. 3, 1997, 1997 WL

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[41] In federal and state opinions in Westlaw, "work clothes" appears 1649 times and "work clothing" 409 times. In the New York Times "work clothes" is used about 2900 times and "work clothing" about 1300 times.

[42] In LEXIS the phrase "protective clothing" appears in 1281 federal and state opinions, while the phrase "protective clothes" is used in only 34 opinions.

[43] *Higgins v. E.I.Dupont de Nemours, Inc.*, 871 F.Supp. 1063, 1065 (D.Md. 1987).

998048 ("§ 203(o) and its legislative history refer only to 'clothes' – and not to 'protective clothing' ").

The Seventh Circuit insisted that an item (such as flame retardant pants) could be both "work clothes" and "protective clothing." On the court's view "protective clothing" designed to deal with workplace hazard is merely a subset of "work clothes." Pet.App. 6a. However, dictionaries in fact treat the phrases "work clothes" and "protective clothing" as non-overlapping. The most common dictionary definition of "blue collar" draws just that distinction. Webster's Third New International Dictionary, for example, defines blue collar as "belonging or relating to a broad class of wage earners whose duties call for the wearing of work clothes *or* protective clothing." 241 (1981) (emphasis added).[44] If, as the Seventh Circuit believed, protective clothing is just a subset of work clothes, this definition would make no sense; it would be like the phrase "meat or beef." These definitions reflect the fact that English speakers tend to use the phrases "work clothes" and "protective clothing" (when worn by workers) as distinct categories.

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[44] *See* Microsoft Encarta World English Dictionary, 151 (2001) (defining blue collar as "relating to or belonging to workers who do manual or industrial work, and who often require work clothes or protective clothing"); Merriam-Webster On Line ("relating to, or constituting the class of wage earners whose duties call for the wearing of work clothes or protective clothing"), available at http://www.merriam-webster.com/dictionary/blue-collar, visited May 6, 2013.

C. Section 203(o) Should Be Narrowly Construed

This Court has repeatedly held that limitations on the scope of and the rights established by the FLSA should be narrowly construed.[45] *Livadas v. Bradshaw*, 512 U.S. 107 (1994), recognized that section 203(o) was intended to be a "narrowly drawn opt-out provision[ ]." 512 U.S. at 132 n.26. Section 203(o) should be construed to limit rights that otherwise exist under the FLSA only when the plain text of section 203(o) clearly mandates that application.

The Portal-to-Portal made emphatically clear that workers are to be paid for work that constituted a principal activity, and for time on the job between the first and last principal activities of the day. 29 U.S.C. § 254(a). The court of appeals in this case expressly concluded that the donning and doffing of the PPE would constitute a principal activity unless section 203(o) made those activities non-compensable.[46] Because U.S. Steel did not cross-petition for review of

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[45] *E.g.*, *Moreau v. Klevenhagen*, 508 U.S. 22, 33 (1993); *Arnold v. Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Mitchell v. Kentucky Finance Co., Inc.*, 359 U.S. 290, 295 (1959); *Phillips v. Walling*, 324 U.S. 490, 493 (1945).

[46] Pet.App. 11a ("Had the clothes-changing time in this case not been rendered noncompensable pursuant to section 203(o), it would have been a principal activity"), 11a ("If an employer requires his employees to don and doff work clothes at the workplace, then donning and doffing are an integral and indispensable part of the workers' main activity (in this case, making steel) and therefore a principal activity"); *see Alvarez*, 339 F.3d at 903.

this aspect of the Seventh Circuit's decision, that issue is not before the Court. Thus if section 203(o) is given the avowedly broad construction advocated by a number of lower courts, it will strip Sandifer and the other claimants of the right to compensation that is otherwise guaranteed by the FLSA.[47] That burden would not fall on all workers equally; workers don and doff different types and amounts of equipment, so some workers' claims are larger than those of others.

The Seventh Circuit acknowledged that this Court has repeatedly held that limitations on the FLSA should be narrowly construed. Pet.App. 9a. It thought those decisions inapplicable, however, because they had involved provisions of section 213 of the FLSA. Section 213 is titled "Exemptions," and this Court's FLSA decisions have held that exemptions should be narrowly construed. The Seventh Circuit insisted that the narrow construction rule is therefore limited to "exemptions," and that a provision of the FLSA can only be an exemption if it is codified in section 213. Section 203(o), the appellate court asserted, "creates an exclusion rather than an exemption" (Pet.App. 9a), and the "difference between exclusion and exemption" it held "is more than a quibble." *Id.*

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[47] U.S. Steel contends that even if section 203(o) does not apply, the time required for donning and doffing the PPE is *de minimis*, and for that reason non-compensable. The district court concluded that that defense raised factual issues which would have to be resolved at trial. Pet.App. 76a-80a.

But it is indeed a quibble. The FLSA decisions of this Court do not recognize a distinction between exemptions and exclusions. In common parlance "exemption" and "exclusion" do not have sharply defined different meanings. Nothing in this Court's FLSA narrow construction decisions suggests that the Court, in using the word "exemption" in its narrow construction decisions, was attempting to fashion a rule that would apply only to section 213. The rationale of this Court's longstanding narrow construction decisions regarding the FLSA does not rest on any special meaning of "exemption" (as opposed to exclusion or exception), but on the importance of that "humanitarian and remedial legislation." *Phillips v. Walling*, 324 U.S. 490, 493 (1945).

The types of exceptions in sections 213 and 203 are not fundamentally different. The Seventh Circuit held that the narrow construction rule is inapplicable to section 203 because that provision – unlike section 213 – excludes categories of workers from the protections of the FLSA, including "American workers abroad." Pet.App. 9a. But section 213 also denies protections to specific categories of individuals, and the provision regarding Americans abroad is actually in section 213(f), not in section 203. The Seventh Circuit described section 213 as the place where "we find exemptions for certain types of worker, such as certain agricultural workers." Pet.App. 9a; *see* 29 U.S.C. §§ 213(h), 213(i), 213(j). But section 203(e)(3) also withholds coverage from certain agricultural workers; it is impossible to see why a narrow construction rule should apply to the exclusion of certain

agricultural workers under section 213 but not to the exclusion of certain agricultural workers under section 203. The Seventh Circuit distinction may be based on its view that under section 203 the FLSA "does not apply" to certain workers, whereas under section 213 the FLSA "exempt[s]" certain workers. Pet.App. 9a. It is unclear why that difference would matter. In any event, the verb "does not apply" appears in section 213, not in section 203. *See* 29 U.S.C. §§ 213(a), 213(b).

The Seventh Circuit thought it significant that section 203 is headed "definitions." Pet.App. 9a. Twenty-four of the subsections in section 203 are indeed definitions; they begin with a word or phrase being defined, in quotation marks, followed most often by the verb "means." But section 203(o) does not look anything like a definition; there is no quoted term being defined, and it reads like a method of calculating something, "the hours for which an employee is employed." Given the absence of any well-established distinction between exemptions and exclusions, it would be as natural to use either word to describe section 203(o).

There is certainly no reason to believe that Congress would have intended, or contemplated, that a different rule of construction would apply to section 203(o) because the drafters of that legislation happened to provide that it would be added to section 203, rather than to section 213. This seems to have been a matter of mere happenstance, at a time when no member of Congress would have had any basis for thinking the difference would be of any importance.

Decisions calling for a different rule of construction for provisions in section 213 and 203 appear to have arisen only within the last decade, more than half a century after section 203 was adopted, a development which Congress could not have foreseen at the time.

This Court has repeatedly applied a presumption in favor of narrow construction of "exemptions" to statutory provisions which did not contain the term "exemption" at all. For example, in *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996), the Court applied to "exemptions from NLRA coverage" the principle that exemptions from the FLSA are to be narrowly construed. 517 U.S. at 399. But the NLRA provision at issue in that case, which placed certain agricultural workers outside the coverage of the NLRA, did not use the term "exemption." The key text of the provision was "shall not include," and the section as a whole (like section 203 in the instant case) was captioned "Definitions." 29 U.S.C. § 152.[48] In *Abbott Laboratories v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1, 4, 12 (1976), the Court used the terms "exception" and "exemption" interchangeably in describing the rule favoring narrow construction (425 U.S. at 12), and referred to the provision at issue as creating an "exemption" even though the text of the provision itself did not use the term "exemption." *Id.* at 6; *see* 15 U.S.C. § 13c. In *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726

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[48] The meaning of that provision of the NLRA was governed by the scope of section 203(f) of the FLSA. 517 U.S. at 397.

(1973), the Court applied its "view that exemptions from antitrust laws are strictly construed" to what it termed the "exemption" from antitrust laws for certain matters regulated by the Federal Maritime Commission, even though the operative language of the provision in question was "shall be excepted." 411 U.S. at 733; *see* 39 Stat. 734.[49]

The terms "exemption," "exclusion," and "exception" (and variations thereof) are used thousands of times throughout the United States Code. "Exemption," for example, appears 2352 times, while "exclusion" appears 1371 times. A parsing of the various long-established rules of narrow construction that turned on which particular word was in a provision would have wide ranging and wholly unpredictable consequences.[50]

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[49] *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979) (applying the rule "that exemptions from the antitrust laws are to be narrowly construed" to 15 U.S.C. § 1012(b)).

[50] A footnote in *Christopher v. Smithkline Beecham Corp.*, 132 S.Ct. 1156 (2012), indicated that the well-established narrow construction rule might not apply to section 213(a)(1) because that provision is "a general definition that applies throughout the FLSA." 132 S.Ct. at 2172 n.21. That footnote is in some tension with previous decisions of this Court, which applied the narrow construction rule to other subparts of section 213(a) which, just like section 213(a)(1), provide that sections 206 and 207 do not apply to certain employees. The clarification of that question can await another day. Section 203(o) is clearly not a "general definition" and does not "appl[y] throughout the FLSA."

D. This Construction of Section 203(o) Provides A Clear Rule Using Distinctions That Already Exist Under OSHA Regulations

This Court should hold that the term "clothes" in section 203(o) does not include items that both are worn to protect the user from workplace hazards and were designed for such a protective function. That exclusion would encompass[51] the "personal protective equipment" required by OSHA regulations, excluding everyday clothing (even if worn for a protective purpose), which is treated differently under those regulations.

The OSHA regulations spell out the most common types of workplace hazards from which workers must be protected.[52] Subpart I of part 1910 of those OSHA regulations, entitled "Personal Protective Equipment," delineates the types of protective items that a covered employer must provide to safeguard

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[51] Whether an item of personal equipment is protective does not depend on whether the OSHA regulations require its use. Any such rule could turn disputes about section 203(o) into protracted litigation about the meaning and application of those regulations. Similarly, whether an item of personal equipment is protective does not depend on whether an employer requires its use; an employer might well accord workers a degree of discretion about what equipment to use. The existence of such a requirement, however, is relevant to whether donning and doffing the equipment is a principal activity. Pet.App. 11a-12a.

[52] 29 C.F.R. part 1910, subpart I, App. B 1 b.

workers against those hazards. 29 C.F.R. part 1910, subpart I. Because employers subject to OSHA are already required to evaluate the hazards at their workplaces, and to identify the personal protective equipment needed to safeguard workers, they at least ordinarily will already know what items are being used to protect against those workplace dangers. *See* 29 C.F.R. § 1910.132(d) ("Hazard assessment and equipment selection").

In the instant case, U.S. Steel has systematically identified workplace hazards at the Gary Works and has selected the particular protective equipment which each worker needs to wear to deal with those dangers. "The.... PPE ... program was developed to provide protection to Gary Complex employees from safety and health hazards in the work place."[53] "Gary Works Management ... assess[es] the workplace to determine if hazards that require the use of PPE are present or are likely to be present in the workplace.... If hazards are present, Gary Works Management ... [s]elect the type of PPE necessary to protect employees from the hazard."[54] All of the protective equipment worn by the workers in this case was specifically

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[53] U.S. Steel Gary Works, Personal Protective Equipment, Dkt. 134-35, Ex. E, 1.

[54] *Id.*

selected by U.S. Steel to deal with a particular workplace hazard.[55]

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[55] *See id.* at 3 ("Each [a]ffected [e]mployee shall use appropriate eye and face protection when exposed to eye and face hazards from flying particles, molten metal, liquid chemicals, chemical gasses or vapors, heat or light radiation."), 9 ("[A]ppropriate eye and face protection [is used] when [a worker] is exposed to dust, flying particles, molten metals, liquid chemicals, liquid acids or caustics, chemical gases or vapors, harmful light radiation, or electrical arc/flash.... There are four types of eye and face protection, each with specific applications: [s]afety glasses ... monogoggles ... [f]ace shields ... [and] [w]elding helmet and hand shields...."), 12 ("Respirators and respirator filters are selected on the basis of the hazard to which the worker is exposed.... Every respirator filter is approved for a specific type or types of contaminant(s)."), 16 (Workers are required to "wear a hard hat ... when there are potential hazards of falling or flying objects or bumping the head against fixed objects. In addition to protecting against impact, hats can protect against electrical shock hazards."), 19 (Hearing protection such as earplugs is mandatory for employees "who work[ ] in an area that has been determined to have a potential for an 8-hour noise exposure of 85 decibels or more."), 21 (Foot protection, such as boots with metatarsal guard, must be worn "when there are hazards of falling or rolling objects, or objects piercing the sole of footwear. Protective footwear shall also be worn where employee's feet are exposed to electrical hazards."), 23 ("Affected Employees [must] use appropriate hand protection when their hands are exposed to hazards such as: [s]kin absorption of harmful substances.... [s]evere cuts or lacerations.... [s]evere punctures or abrasions.... [c]hemical or thermal burns/exposures.... [and] [e]xtreme temperatures.... The gloves must be matched to meet the specific type of hazard [the worker is] likely to encounter.") (italicization omitted), 28 (Flame retardant items are required "when there is potential for injuries from flames, sparks, molten metal, or electrical flash.").

Where an item is *not* specifically designed to have a protective function, it can constitute clothes within the meaning of section 203(o), even if it was selected (like wearing white at night) because it is safer. That would be consistent with the differences in common use, described above, between "work clothes" and "protective clothing." The OSHA regulations already draw just such a distinction, providing that although an employer ordinarily must itself pay for personal protective equipment, it need not pay for "[e]veryday clothing, such as long-sleeve shirts, long pants, street shoes, and normal work boots" or for "[o]rdinary clothing ... used solely for protection from weather, such as winter coats, jackets, gloves, parkas, rubber boots, hats, raincoats, [and] ordinary sunglasses." 29 C.F.R. § 1910.132(h)(4)(ii) and (iii). This distinction is already familiar to employers including U.S. Steel itself, which for safety reasons requires that the personal clothing employees wear under the PPE be cotton or wool,[56] but (in light of the distinction made by the OSHA regulations) does not pay for that everyday clothing. Otherwise, consistent with the requirement that employers must themselves pay for any other personal protective equipment, section 203(o) should be construed to require employers also to compensate workers for the time required to put on and take off personal protective equipment that was designed and is used to protect against workplace hazards.

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[56] Dkt. 134-35, Exhibit E, pp. 28-29.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

STATUTES AND REGULATION INVOLVED

Section 203(o) of the Fair Labor Standards Act, 29 U.S.C. § 203(o), provides:

> In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

Section 254(a) of 29 U.S.C., section 4 of the Portal-to-Portal Act, provides in pertinent part:

> Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938. . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947 –
>
> > (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on which any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Section 790.8(c) of 29 C.F.R. provides in pertinent part:

> Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes[65], changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary activity rather than a principal part of the activity.

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[65] Such a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work.

Decisions Holding Ear Plugs or Safety Glasses Are "Clothes" Under Section 203(o)

Allen v. McWane, Inc., 593 F.3d 449, 451 (5th Cir. 2010) (safety glasses, ear plugs)

Anderson v. Cagle's, Inc., 2005 WL 3873160 at *5 (M.D.Ga. Dec. 8, 2005), *aff'd* 488 F.3d 945 (11th Cir. 2007) (ear protection)

Anderson v. Pilgrim's Pride Corp., 147 F.Supp.2d 556, 561 (E.D.Tex. 2001) (ear plugs, safety glasses)

Andrako v. United States Steel Corp., 632 F.Supp.2d 398, 410 (W.D.Pa. 2009) (safety glasses)

Arnold v. Schreiber Foods, Inc., 690 F.Supp.2d 672, 674-75 (M.D.Tenn. 2010) (safety glasses, ear plugs)

Atkinson v. House of Raeford Farms, Inc., 2011 WL 1526605 at *3 (April 20, 2011) (ear plugs, safety glasses)

Burks v. Equity Group-Eufaula Division, LLC, 571 F.Supp.2d 1235, 1240 (M.D.Ala. 2008) (earplugs)

Castaneda v. JBS USA, LLC, 2011 WL 3294032 at *1 (Aug. 1, 2011) (ear plugs, safety glasses)

Curry v. Kraft Foods Global, Inc., 2012 WL 104626 at *1 (Jan. 12, 2012) (ear plugs, safety glasses)

Davis v. Charoen Pokphand (US), Inc., 302 F.Supp.2d 1314, 1317-19 (M.D.Ala. 2004) (ear plugs)

Fox v. Tyson Foods, Inc., 2007 WL 6477624 (N.D.Ala. Aug. 31, 2007), 2002 WL 32987224 at *3 and n.3 (N.D.Ala. Feb. 4, 2002) (safety glasses, earplugs)

Franklin v. Kellogg Co., 619 F.3d 604, 608 (6th Cir. 2010) (safety glasses, ear plugs)

Gatewood v. Koch Foods of Mississippi, LLC, 569 F.Supp.2d 687, 689-90 (S.D.Miss. 2008) (eye protection)

Guinan v. Boehringer Ingelheim Vetmedica, Inc., 803 F.Supp.2d 984, 988 (N.D.Iowa 2011) (safety glasses with side shields, face shield, safety goggles)

Hudson v. Butterball, LLC, 2009 WL 3486780 at *1 n.2 (Oct. 14, 2009) (ear plugs, safety glasses)

Israel v. Raeford Farms of Louisiana, LLC, 784 F.Supp.2d 653, 656 (W.D.La. 2011) (ear plugs)

Johnson v. Koch Foods, Inc., 670 F.Supp.2d 657, 660 (E.D.Tenn. 2009) (ear plugs, safety glasses)

Kassa v. Kerry, Inc., 487 F.Supp.2d 1063, 1066 (D.Minn. 2007) (safety glasses)

Marshall v. Amsted Rail Co., 817 F.Supp.2d 1066, 1069, 1074 (S.D.Ill. 2011) (goggles, ear plugs, face shield)

McDonald v. Kellogg Co., 740 F.Supp.2d 1220, 1227 (D.Kan. 2010) (safety glasses)

Mitchell v. JCG Industries, 2013 WL 887985 at *1 (March 8, 2013) (ear plugs)

Salazar v. Butterball, LLC, 644 F.3d 1130, 1134 (10th Cir. 2011) (earplugs, safety glasses)

Saunders v. John Morrell & Co., 1991 WL 529542 at *1 (Dec. 24, 1991) (goggles)

Sepulveda v. Allen Family Foods, Inc., 591 F.3d 209, 212 (4th Cir. 2009) (safety glasses, ear plugs)

Sisk v. Sara Lee Corp., 590 F.Supp.2d 1001, 1003 (W.D.Tenn. 2008) (ear plugs)

In re Tyson Foods, Inc., 694 F.Supp.2d 1358, 1362 (M.D.Ga. 2010) (ear plugs)

RESPONDENT'S BRIEF

No. 12-417

IN THE

Supreme Court of the United States

CLIFTON SANDIFER ET AL.,

Petitioners,

v.

UNITED STATES STEEL CORP.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

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QUESTION PRESENTED

Under 29 U.S.C. § 203(o), an employer and a union may agree that time spent "changing clothes" will not be part of "the hours for which an employee is employed" for purposes of the Fair Labor Standards Act ("FLSA"). Petitioners' union has agreed with Respondent that time Petitioners spend changing into protective clothing—such as flame-retardant pants and jackets, work gloves, work boots, hoods, leggings, and long wrist bands—is not part of the compensable workday.

The question presented is:

Does the donning and doffing of protective work clothes at issue in this case constitute "changing clothes" within the meaning of § 203(o), such that Petitioners' changing time is excluded from the hours for which they are employed?

CORPORATE DISCLOSURE STATEMENT

Respondent United States Steel Corporation ("U. S. Steel") is a publicly held company. It has no parent company, and there is no publicly held company owning 10% or more of U. S. Steel's stock.

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STATEMENT OF THE CASE

This case arises out of a putative collective action brought by Petitioners under the FLSA, 29 U.S.C. § 216(b). Petitioners alleged that they were entitled to overtime compensation for time spent donning and doffing protective clothing notwithstanding the agreement of Petitioners' union that such activities are not part of the compensable workday. Congress amended the FLSA in 1949 to provide that time spent "changing clothes ... at the beginning or end of each workday" is excluded from "the hours for which an employee is employed," where, as here, a union and an employer so agree. 29 U.S.C. § 203(o). If this language refers to the activity of changing into and out of the outfit worn by an employee to be ready to work, then the agreement of Petitioners' union places the donning and doffing time in this case outside the compensable workday, and Petitioners' claims fail. As described below, the statutory text, structure, and context all make clear that Congress intended precisely this meaning.

A. Statutory Background

1. Congress enacted the FLSA in 1938 to "give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive 'a fair day's pay for a fair day's work.'" *Barrentine v. Arkansas Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (quoting *Overnight Motor Transport. Co. v. Missel*, 316 U.S. 572, 578 (1942)) (emphasis omitted).

The two core provisions of the Act—the minimum wage provision and the overtime provision—require that employees receive a minimum hourly wage for each hour that they are "employ[ed]" as well as a

premium wage (one and one-half times the regular rate of pay) for each hour they are "employ[ed]" beyond 40 in one workweek. 29 U.S.C. §§ 206(a), 207(a). The FLSA defined the term "employ" as "to suffer or permit to work." 29 U.S.C. § 203(g). The Act, however, did not define the term "work."

This statutory gap touched off a series of lawsuits seeking compensation for time spent by employees in preparing to engage in productive work. For example, iron and coal miners sought payment for travel time to and from "the working face" of mines, *Tennessee Coal, Iron & R.R. Co. v. Muscoda*, 321 U.S. 590, 597-98 (1944); *see also Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 165-66 (1945), and manufacturing workers sought compensation for "various preliminary duties, such as putting on aprons and overalls, [and] removing shirts." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 683 (1946).

In a trio of high profile cases, the Court held that even if such practices were not considered work according to the customs of an industry, they were still deemed work under the FLSA. The Court reasoned that "work" under the Act included all "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R.R. Co.*, 321 U.S. at 597-98; *see also Jewell Ridge Coal Corp.*, 325 U.S. at 165-66. Moreover, the Court added, "work" also included "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson*, 328 U.S. at 690-91.

2. This broad definition of "work" produced a flood of new claims seeking compensation for activities such as "proceeding to places of work and changing into work and/or protective clothing." *Grospian v. Pan Am. Ref. Corp.*, 6 F.R.D. 453, 456 (S.D. Tex. 1947); *see also, e.g.*, Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 Buff. L. Rev. 53, 116 n.333 (1991) (citing *Portal Pay Suits Exceed a Billion*, N.Y. Times, Dec. 29, 1946, at 1, col. 8; *Bethlehem Sued for $200,000,000*, N.Y. Times, Dec. 29, 1946, at 3, col. 4; *Portal Pay Suits Pass $900,000,000*, N.Y. Times, Dec. 28, 1946, at 2, col. 4; *6 Billion Possible in Portal Claims*, N.Y. Times, Dec. 22, 1946, at 3, col. 4; *Asks $120,000,000 in Portal Pay Suit*, N.Y. Times, Dec. 10, 1946, at 24, col. 5 (suit by USWA members against U. S. Steel)).

"After [over] a half-century, it is difficult to recapture the intensity of a conflict over what was after all only a minor aspect of the federal wage and hour law—which the New York Times called 'one of the greatest legal-economic controversies in American history.'" Linder, *supra* at 54 (quoting White, *Government Asks Portal Case Ban; Origin "Trifling,"* N.Y. Times, Jan. 24, 1947, at 1, col. 8).

Congress reacted quickly to address the threat of "wholly unexpected liabilities" and to protect "long-established customs, practices, and contracts between employers and employees" by passing the Portal to Portal Act of 1947, § 1, 61 Stat. 84, 29 U.S.C. § 251(a). The Portal to Portal Act operated both retrospectively and prospectively. Retrospectively, the Act eliminated all claims seeking compensation for any activity prior to the date of enactment unless

based on an express provision in a contract or an established custom or practice that treated the time in question as compensable. *Id.* § 2, 29 U.S.C. § 252(a).

Prospectively, the Portal to Portal Act amended the FLSA to provide that "no employer shall be subject to any liability or punishment under the [FLSA] ... on account of any of the following activities ...:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities ....

29 U.S.C. § 254(a). This default rule of non-compensability could be altered, however, by the parties' agreement. Specifically, the activities could be made compensable by "an express provision of a written or nonwritten contract" or by "a custom or practice in effect ... at the establishment or other place where such employee is employed." *Id.* § 254(b).

The Portal to Portal Act thus drew a key distinction between two types of activities that fell within the Court's broad definition of "work": mere travel or "preliminary" and "postliminary" activities on the one hand (which did not need to be

compensated absent a contrary practice or agreement), and "principal" activities on the other (which always had to be compensated).[1]

3. The Portal to Portal Act did not fully settle the question of whether activities that were not considered "work" under industry custom or contract could nonetheless be compensable under the FLSA. In 1947, immediately after the Portal to Portal Act was enacted, the Wage and Hour Division of the Department of Labor issued a guidance suggesting that the Portal to Portal Act should be "narrowly construed" such that some clothes changing and washing might not be a preliminary or postliminary activity, and could instead be part of an employee's

---

[1] The impact of that distinction increased under a Department of Labor regulation first adopted in 1947, which imposed a "continuous workday rule." *See* U.S. Dep't of Labor, Wage and Hour Division, General Statements on the Effects of the Portal to Portal Act of 1947 on the Fair Labor Standards Act of 1938 (Nov. 18, 1947), 29 C.F.R. § 790.6(b); *see also IBP, Inc. v. Alvarez*, 546 U.S. 21, 29 (2005). That rule requires that a covered employee be paid for the entire "period between the commencement and completion on the same workday of an employee's principal activity or activities." 29 C.F.R. § 790.6(b). Accordingly, if a particular task assigned to an employee is a "principal" work activity, it generally triggers a duty by the employer to compensate the employee until the end of the employee's day, as marked by the completion of the last principal activity.

principal activity. 29 C.F.R. §§ 790.2(a), 790.7. In particular, the Division cautioned that:

> "Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's 'principal activity.'"

Id. § 790.7, n.49. The Division cited an example from the legislative history of the Portal to Portal Act, in which Senators Cooper and McGrath had suggested that if "chemical plant[] workers [we]re required to put on special clothing and to take off their clothing at the end of the day" to protect themselves from chemicals, this changing time would not constitute a preliminary or postliminary activity. *See* Colloquy Between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298 (cited at 29 C.F.R. § 790.8(c)). Referring to this exchange, the Division concluded that such donning and doffing of essential clothing "would be an integral part of the employee's principal activity" while "changing clothes [that] is merely a convenience to the employee and not directly related to his principal activities ... would be considered as a 'preliminary" or "postliminary' activity." *Id.* § 790.8(c).

Soon after the issuance of this guidance, industry groups pressed Congress to "cur[e] the defect in the Fair Labor Standards Act itself which caused the previous 'portal' emergency and now presents us with another." *A Bill to Provide For the Amendment of the Fair Labor Standards Act of 1938 and For Other Purposes: Hearings on H.R. 2033 Before the House Comm. on Educ. and Labor*, 81st Cong. 1565 (1949)

(statement of William Quinlan, on Behalf of Associated Retail Bakers of America) ("Bakers Statement"). The National Association of Manufacturers complained:

> [I]t is now contended by the Wage and Hour Administrator that much of the time sought to be excluded from the legal workday by the "Portal" Act, must be considered as compensable under that act if the nature of an employee's job requires or encourages him to perform "preliminary" or "postliminary" activities such as putting on special clothes or washing up before or after work. Thus, within a relatively short time after Congress has acted to correct recognized evils of interpretation of the FLSA, it would seem necessary that it enact additional legislation to guarantee that its intent as expressed in a statute will be followed.

An Act To Amend the Fair Labor Standards Act of 1938, Hearings on S. 653, Subcommittee of the Senate Committee on Labor and Public Welfare, 81st Cong. 394 (1949) (memorandum of the National Association of Manufacturers) ("NAM Statement").

The House responded with a bill that would have allowed an employer and a union to exclude *any* time from "hours worked." H.R. 5856, 81st Cong. (1949). Although that first version was not adopted, Congress did enact a later version, which addressed the two specific activities that the Wage and Hour Division had suggested could constitute principal activities: "washing up" and "the changing of clothes." *See* 95 Cong. Rec. 14,991 (Oct. 17, 1949).

Specifically, Congress inserted subsection (o) in the definitions section of the FLSA. It provides:

> Hours Worked.— In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

29 U.S.C. § 203(o).

The legislative history confirms that this amendment was intended to address the possibility, identified in the Wage and Hour Division guidance, that employers could be held liable for clothes changing and washing that was deemed integral and indispensible to an employee's job. As described by Representative Herter, the House sponsor, the amendment was "offered for the purpose of avoiding another series of incidents which led to the portal-to-portal legislation." 95 Cong. Rec. 11,210 (Aug. 10, 1949). Representative Herter explained that:

> In the bakery industry, for instance, ... there are collective-bargaining agreements with various unions in different sections of the country which define exactly what is to constitute a working day and what is not to constitute a working day.... [T]he matter has been carefully threshed out between the employer and the employee and apparently both

> are completely satisfied with respect to their bargaining agreements.
>
> The difficulty, however, is that suddenly some representative of the Department of Labor may step into one of those industries and say, "You have reached a collective-bargaining agreement which we do not approve. Hence the employer must pay for back years the time which everybody had considered was excluded as a part of the working day." ...This amendment is offered merely to prevent such a situation arising and to give sanctity once again to the collective-bargaining agreements as being a determining factor in finally adjudicating that type of arrangement.

Id.

B. Factual Background

1. Gary Works, U. S. Steel's flagship facility, is an integrated steel plant spread across nearly 3,000 acres in Gary, Indiana. J.A. 65-66. The nonmanagement work force of approximately 4,500 employees is represented by the United Steelworkers of America AFL-CIO-CLC ("USWA"), the largest industrial labor union in North America. J.A. 68-69.

Gary Works operates on a continuous, twenty-four hour basis, with each day divided into three eight-hour shifts. J.A. 73, 84. Since as far back as 1947, U. S. Steel and the USWA have agreed in national

collective bargaining agreements that employees are to be paid by the shift. J.A. 73-75; R.85 at 267, 392.[2] Thus, although employees use security swipe cards at the entry gates, they do not use time clocks to track daily working time. J.A. 74, 76. Rather, most employees' shifts begin and end at exact times—*e.g.*, 6:00 a.m. to 2:00 p.m., 2:00 p.m. to 10:00 p.m., and from 10:00 p.m. to 6:00 a.m. *See, e.g.*, J.A. 76, R.85 at 324. Other shifts operate on a "buddy relief" system, under which the shift change occurs by way of face-to-face, personal relief that ensures continuation of operations. J.A. 84-86. In all events, however, employees are assigned to, work, and are paid for an eight-hour shift. J.A. 74, 92-93.

To get ready to work, many employees change into their work clothes in locker rooms before walking or riding buses to their assigned work stations. J.A. 77-81. While the work clothing worn by individual employees varies based on their specific assignments, work clothes can include: flame-retardant pants and a jacket (often called "greens," though now orange in color), metatarsal boots, leggings, long wrist bands (or "wristlets"), a cloth hood (or "snood"), a hard hat, safety glasses, and ear plugs. *Id.* Although some employees are required to wear respirators intermittently at their work stations, they are not required to don and doff them in the locker rooms at the beginning of the day. Rather, though some

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[2] Citations beginning with "R._" refer to the district court record; *e.g.*, "R.85" refers to ECF No. 85 in the district court.

employees may carry respirators from their locker rooms, they are "put on as needed at job locations." Pet. App. 21a; *see also* R.85 at 326.

After changing into their work outfits, employees travel from their locker rooms to their assigned work locations. R.85 at 327. After the end of a shift, employees travel back to their lockers from their assigned work locations. *Id.* at 329. Some (but not all) employees then use company facilities to shower or otherwise wash up and change into their personal clothes before leaving the plant. J.A. 53-54, 76-77, 88; R.85 at 332, 372, 338. Since employees are not "on the clock" during their changing and travel at the beginning and end of the work day, they may proceed to and from their work locations at their own pace, so long as they are at their work locations for their scheduled shifts. J.A. 76, 77.

2. For over 60 years, the collective bargaining agreements, or Basic Labor Agreements ("BLAs"), between U. S. Steel and the USWA have provided that time spent in preparatory and closing activities is not compensable. R.85 at 267, 392. Rather, to meet the staffing requirements for continuous 24-hour production, employees must be at their assigned work locations at the commencement of their eight-hour shifts. J.A. 75. Simply being in the plant, in a locker room, or on the way to or from a work location has never been considered "being at work." J.A. 75, 82-83.

In 2008, after this case was filed, USWA and U. S. Steel negotiated and agreed to a successor BLA that, once again, confirmed USWA's agreement to exclude preparatory and closing activities from the compensable workday. The BLA affirmed that:

> starting in 1947, every national collective bargaining agreement or BLA negotiated by the Parties has included an agreement that the Company is not obligated to pay Employees for preparatory or closing activities which occur outside of their schedule shift or away from their worksite (i.e., so-called "portal-to-portal" activities). Such activities include such things as donning and doffing of protective clothing (including such items as flame-retardant jacket and pants, metatarsal boots, hard hat, safety glasses, ear plugs, and a snood or hood), and washing up.

R.106-4 at 392.[3]

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[3] In the course of the 2008 collective bargaining, USWA and U. S. Steel also agreed that certain coke plant employees "who are required to shower at the end of their shift will be provided with twenty (20) minutes wash-up time prior to the end of the Employee's shift, or a daily additive in an amount calculated at four-tenths (0.4) of an hour at the Employee's Base Rate of Pay." *Id.*

USWA also agreed to "withdraw any so-called donning and doffing claims or lawsuits" and to "use its best efforts to have any such claims or lawsuits to which it is a party, and ... use its best efforts to have any such claims to which it is not or was not a party dismissed." *Id.*[4]

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[4] Petitioners note that, between 1947 and 2003, the applicable BLAs excluded only travel time or "time spent in preparatory and closing activities" but "did not specifically mention time spent donning and doffing clothes or personal safety equipment." Petr. Br. 11. To the extent Petitioners contend that the clothes changing time at issue in this case was *not* excluded from compensable working time "under a bona fide collective-bargaining agreement," 29 U.S.C. § 203(o), this is contrary to the position Petitioners took in their certiorari petition and the findings of the district court. Pet. 12, Pet. App. 42a-43a. Moreover, it is contrary to the ratified collective bargaining agreement of the parties, which expressly observed: "[S]tarting in 1947, every national collective bargaining agreement or BLA negotiated by the Parties has included an agreement that the Company is not obligated to pay Employees for preparatory or closing activities." R.106-4 at 392. Of course, to the extent Petitioners' donning and doffing time is not excluded from compensable working time under a collective bargaining agreement, the Question Presented is not implicated here, and the Court should dismiss this case as improvidently granted.

3. The eight Petitioners in this case were all employees at Gary Works during at least some of the time period in question and were covered by the minimum wage and overtime provisions of the FLSA. J.A. 94-99. Petitioners filed a putative collective action against U. S. Steel seeking overtime compensation for time spent donning and doffing protective clothing, washing after work, and traveling to and from their assigned workstations.

C. The Decisions Below

1. The district court granted summary judgment in favor of U. S. Steel on the clothes changing claims.[5] Pet. App. 28a-43a. The district court reasoned that "the cloth jacket and pants, fabric snoods, hoods, leggings, and wristlets, and boots here at issue easily fall within the ordinary definition of 'clothes.'" Moreover, the court explained, "even if [it] were to assume that hard hats, safety glasses, and ear plugs aren't 'clothes,' ... the time expended by each employee donning and doffing those items is

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[5] The district court also granted summary judgment on the related washing claims, Pet. App. 53a, but denied summary judgment on the travel time claims, Pet. App. 50a. Petitioners did not perfect an appeal of the washing time claims, Pet. App. 2a-3a. The Court of Appeals later reversed the denial of summary judgment on the travel claims, Pet. App. 10a-19a, but this Court denied certiorari on that issue, 133 S. Ct. 1240 (Feb. 19, 2013).

minimal, or *de minimis*, and thus not compensable under the FLSA." Pet. App. 33a-34a.

2. A unanimous panel of the Seventh Circuit affirmed on similar reasoning. The pants, jackets, gloves, boots, and hoods were clothing, the court concluded, because "[a]lmost any English speaker would say that the [items constituted] work clothes." Pet. App. 7a. The court rejected Petitioners' argument that items could not be clothing because they were "personal protective equipment," explaining that this distinction assumed a false dichotomy:

> Protection—against sun, cold, wind, blisters, stains, insect bites, and being spotted by animals that one is hunting—is a common function of clothing, and an especially common function of work clothes worn by factory workers. It would be absurd to exclude all work clothes that have a protective function from section 203(o), and thus limit the exclusion largely to actors' costumes and waiters' and doormen's uniforms.

Id. at 6a.

The Court further emphasized that finding clothing to be within the scope of § 203(o) did not necessarily mean that any employees would be denied compensation for clothes changing time but, rather, would simply allow unions and employers to engage in collective bargaining over the issue. *Id.* at 7a. Indeed, the Court explained, "[t]he fact that the clothing exclusion is operative only if it is agreed to in collective bargaining implies ... that workers are compensated for the time they spend changing into

work clothes, and washing up and changing back." *Id.* That is, § 203(o) "allows unions and employers to trade off the number of compensable hours against the wage rate" and "[t]he steelworkers would not have given up their statutory entitlement to time and a half for overtime, when changing clothes or traveling to and from their work stations, without receiving something in return." *Id.* (quoting *Spoerle v. Kraft Foods Global, Inc.*, 614 F.3d 427, 428 (7th Cir. 2010)).

Finally, although the court suggested that the glasses, ear plugs, and hard hats worn at Gary Works might not be clothing "in the ordinary sense," the court did not definitively resolve the matter under § 203(o), finding that, "in any event putting on the glasses and the hard hat and putting in the ear plugs is a matter of seconds and hence not compensable, because *de minimis*." Pet. App. 5a-6a (citing *Mt. Clemens*, 328 U.S. at 692).

SUMMARY OF ARGUMENT

I. When read in context and as a complete, integrated sentence, § 203(o) does not simply address the compensability of wearing isolated items of "clothes." Rather, it allows unions and employers to bargain over the compensability of an *activity*: "changing clothes...at the beginning or end of each workday." This complete phrase clearly refers to the process of putting on the entire outfit worn by an employee to be ready to work at the beginning of the day, and taking off that outfit at the end of the day. That plain, straightforward meaning is clear from the statutory text, and is further confirmed by the context, structure, and purpose of § 203(o).

As an abstract matter, dictionary definitions show that the phrase "changing clothes" can refer broadly to any act that "alter[s]" any "covering for the human body." *See* The Shorter Oxford English Dictionary on Historical Principles 291 (2d ed. 1939) ("Shorter Oxford") (defining "changing" to mean "to render different, alter"); Webster's New International Dictionary 507 (2d ed. 1948) ("Webster's Second") (defining "clothes" as "covering for the human body"). The surrounding text, moreover, refers to clothes changing that occurs "at the beginning or end of each workday" and is significant enough to be a subject of "bona-fide collective bargaining." 29 U.S.C. § 203(o).

This context makes clear that the "covering" contemplated by § 203(o) was the work outfit worn by an employee to be ready to work, and that the "alteration" contemplated was the activity of putting on or taking off this work outfit at the beginning and end of each day. The statutory text, moreover, draws

no distinction between donning and doffing different types of work outfits, or specific parts of a work outfit. Thus, "changing clothes" refers to the activity of putting on the entire outfit worn by an employee to be ready to work at the beginning of the day, and taking off that outfit at the end of the day.

The purpose of § 203(o) and its interaction with the broader statutory scheme only confirm this plain meaning. In 1949, industrial workers regularly donned and doffed a wide range of work outfits, which included items such as protective boots, leather and asbestos aprons, fire-resistant leggings and arm protection, heavy helmets, protective hoods, and respirators, all of which were referred to as "work clothes" when worn as part of a work outfit. Given the passage of the Portal to Portal Act only two years earlier, Congress was well aware of such work outfits, and the controversy over whether time spent donning these outfits at the beginning of each workday (and doffing these outfits at the end of the workday) should be part of the compensable workday.

Having enacted § 203(o) to allow collective bargaining over the compensability of such donning and doffing time, there is no basis to believe Congress would have distinguished between donning and doffing any of the individual parts of a work outfit, or between donning and doffing different kinds of work outfits. Congress would not have deemed it sensible for unions to bargain over the time spent changing into pants, but not over the time spent donning a hardhat, or flame-retardant pants. Moreover, any such distinction would have frustrated Congress's clear purpose of deferring to collective bargaining regarding whether time spent getting ready to work

by donning a work outfit was part of the compensable workday, and would have mired Courts in precisely the sort of fact-intensive judgments that § 203(o) was intended to avoid.

In fact, if Congress was more concerned with the donning and doffing of some outfits in particular, it was concerned primarily with the donning and doffing of the specialized and protective work outfits that were essential to industrial jobs. Where donning and doffing "ordinary" work clothes was merely "preliminary" or "postliminary" to work, it was *already* rendered non-compensable by the Portal to Portal Act. Even the Department of Labor's narrow 1947 interpretation of the Portal to Portal Act assumed that changing clothes would be non-compensable "under the conditions normally present." 29 C.F.R. § 790.7(g). Accordingly, if § 203(o) has any affect at all, it necessarily must apply to clothes changing that otherwise would be a principal activity. Indeed, Congress enacted § 203(o) as a direct response to the Department of Labor's suggestion that the Portal to Portal Act did not extend to principal "activities such as putting on *special* clothes [*e.g.*, to protect from chemical exposure] or washing." NAM Statement, *supra* at 394 (emphasis added).

Reading § 203(o) to encompass time spent donning and doffing any part of a work outfit also produces a clear, administrable rule. In most cases, it will be easy to apply because an item is generally either put on as part of the work outfit at the beginning of the day, or it is not. This clear rule eliminates the risk that courts will upend collective bargaining agreements and leaves unions and employers with

the flexibility to determine, in light of the best interests of the parties and the practicalities of the workplace, whether "hours worked" under the FLSA should include donning and doffing time. That, of course, was precisely what Congress intended when it enacted § 203(o).

II. Petitioners ask this Court to hold that § 203(o) does not apply to any clothes that are specially designed to be protective in the workplace. They appear to offer three reasons for this expansive limitation. First, they contend that when Congress used the term "clothes" in § 203(o), it was likely not contemplating specialized and protective work clothing. Second, and relatedly, they assert that specialized and protective work clothing is not the sort of clothing one "changes" into and out of. Third, they contend that excluding such clothing from the reach of § 203(o) would make the provision easier to administer.

These arguments are fundamentally misguided. Petitioners ignore that § 203(o) refers to the *activity* of "changing clothes"—donning and doffing the outfit worn by an employee to be ready to work—and instead focus on individual words in isolation from each other and the statutory context. Moreover, even on their own terms, Petitioners' arguments fail to offer any affirmative definition of "clothes." Instead, Petitioners seek to engraft an arbitrary exclusion for items that, although clearly clothing under any definition, are also specialized and protective.

That clothes are "protective" or "specialized" does not mean that they cease to be clothes. Specialized and protective clothes are common. They are

particularly common within the subset of clothes that are put on and taken off "at the beginning or end of each workday." 29 U.S.C. § 203(o). And they are the paradigm of clothes, the donning and doffing of which could be deemed "integral and indispensible" to industrial jobs. Excluding the changing of such clothes from the coverage of § 203(o), such that it is outside the reach of collective bargaining, would exclude precisely the class of activities targeted by Congress.

Petitioners attempt to justify their arbitrary limits on the statutory text by engaging in an extended discussion of hypotheticals—ranging from "tourists ask[ing] for directions to a clothes store," Petr.32, to magic cloaks, Petr. Br. 36 n.31, to "burn pressure garments" Petr. Br. 37-38—that ignores the context of § 203(o). But the fact that Petitioners' approach would exclude from § 203(o) precisely the class of clothes changing with which Congress was most concerned only highlights the importance of reading statutory text in light of "the specific context in which that language is used, and the broader context of the statute as a whole" *Caraco Pharm. Laboratories, Ltd. v. Novo Nordisk A/S*, 132 S. Ct. 1670, 1680 (2012) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Congress was not thinking of magic cloaks when it enacted § 203(o); it was focused on the activity of donning and doffing work outfits, particularly those that were essential to heavy industrial jobs.

Petitioners also ignore statutory context when they argue that the verb "changing" excludes protective work clothes because such clothes are not "substituted" for other clothes. The function of §

203(o) makes clear that the phrase "changing clothes" refers to any donning and doffing of work outfits, and that it would be unworkable and arbitrary to limit § 203(o) to situations in which employees remove some clothing before donning those outfits. Under Petitioners' approach, whether or not an employee changed clothes would depend on the highly variable and utterly inconsequential question of what clothes he wore to work, and his personal choices regarding what garments to leave on under his work clothes. In all events, such a definition of "changing" does not even advance Petitioners' position: many workers, including employees at Gary Works, remove their street clothes before donning protective work clothing.

Finally, Petitioners' approach makes § 203(o) less administrable, not more. Petitioners create ambiguity in § 203(o) only by refusing to read the provision as a whole and asking what items, viewed in isolation and outside the context of § 203(o), resemble everyday clothes. They then urge an atextual exception for specialized and protective work clothes to avoid this ambiguity of their own creation. However, even assuming that it were appropriate for the Court to pursue administrability by engrafting arbitrary limitations onto a statute, Petitioners' approach would only make § 203(o) more ambiguous.

Excluding all protective work clothes from § 203(o) does nothing to define "clothes," but simply introduces the additional line-drawing problems of what clothing is "specialized" and "protective." Petitioners' approach thus departs from congressional intent while remaining no more administrable than the straw man Petitioners attack.

III. Even if the Court declines to read the term "changing clothes" in § 203(o) as applying to the activity of donning the entire outfit that the employee will wear to be ready to work (and doffing that outfit at the end of the workday), the items at issue in this case are still "clothes" under any definition. Two such definitions are possible.

First, one could define "clothes" according to its dictionary definition—as any "covering for the human body"—but simply apply that definition on an item-by-item basis. Under that definition, each of the items at issue in this case—the jackets, pants, boots, gloves, hoods, wristlets, and leggings described above—are clearly "clothes," as each is a "covering for the human body." The categorization of other parts of the work outfit worn at Gary Works—a respirator, hard hat, glasses, and earplugs—is no longer at issue in this case, because the courts below held that the time spent donning these items was either *de minimis*, or already compensated. However, these items are clearly "coverings for the human body" as well.

Second, one could conceivably attempt to define "clothes" on a case-by-case and item-by-item basis to include only items that an English speaker, unaware of any statutory context, might consider somehow similar to everyday, commonplace "clothes." Under that approach, as well, the pants, jackets, boots, gloves, hats, leggings, and wristlets are plainly clothes, as these items are not materially different from "ordinary" articles that an English speaker would readily describe as "clothes."

Although both of these alternative approaches depart from the text and purpose of § 203(o) (the second dramatically so), they at least offer a definition of the statutory term "clothes, while Petitioners' approach offers no definition of "clothes" at all.

ARGUMENT

I. "CHANGING CLOTHES" IN SECTION 203(O) REFERS TO THE ACTIVITY OF DONNING AND DOFFING THE ENTIRE OUTFIT WORN BY AN EMPLOYEE TO BE READY TO WORK.

When understood in light of the plain statutory text, structure, purpose, and history, the intent behind § 203(o) is obvious: to allow unions and employers to bargain collectively over the compensability of time employees spend putting on the entire outfit worn by an employee to be ready to work at the beginning of the day, and taking off that outfit at the end of the day.

A. The Statutory Text And Context Make Clear That "Changing Clothes" In § 203(o) Refers To The Activity of Donning And Doffing The Entire Outfit Worn By An Employee To Be Ready To Work.

It is a fundamental rule of statutory construction (and indeed language), that "a single word cannot be read in isolation." *Smith v. United States*, 508 U.S. 223, 233 (1993). *See also United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not, however, construe statutory phrases in isolation; we read statutes as a whole."). Likewise, in assessing the scope of a statute, one must read the text in light of

"the specific context in which that language is used, and the broader context of the statute as a whole." *Caraco Pharm. Labs.*, 132 S.Ct. at 1680 (quoting *Robinson*, 519 U.S. at 341).

These principles are particularly important in this case, as reading the statutory text in context and as a complete sentence eliminates any doubt regarding congressional intent.

As a matter of context, it is important to recognize that § 203(o) allows collective bargaining over the compensability of time spent on the *activity* of changing clothes, not the compensability of wearing specific objects. The entire statutory framework that § 203(o) modified dealt with time spent on different types of activities. Thus, although the Act did not contain a definition of "work," the Court had initially defined the concept of work as any "*physical or mental exertion* ... controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R.R. Co.*, 321 U.S. at 597-98 (emphasis added). In responding to this definition, the Portal to Portal Act eliminated liability on account of "*walking, riding, or traveling* to and from the actual place of performance of *the principal activity or activities*" as well as "*activities* which are preliminary to or postliminary to said *principal activity or activities*." 29 U.S.C. § 254(a) (emphasis added).

Against this statutory background, Congress enacted § 203(o) to permit a union and employer to bargain over the compensability of any "*time spent in changing clothes* ...at the beginning or end of each

workday." (Emphasis added).[6] Thus, it could not be clearer that, in enacting § 203(o), Congress was focused on allowing collective bargaining over the compensability of the activity of changing clothes, not the objects that the employee was wearing.

What, then, did Congress mean when it referred to the activity of "changing clothes...at the beginning or end of each workday?" As an abstract matter, dictionary definitions show that the phrase "changing clothes" is extremely broad. When Congress enacted § 203(o), the term "clothes" was consistently defined (and is still defined) to include any "covering for the human body." Webster's Second at 507.[7] And the primary dictionary definition of "changing" was "to render different, alter," Shorter

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[6] Section 203(o) also refers to the *activity* of "washing."

[7] *See also* Shorter Oxford at 327 (defining "clothes" as "[c]overing for the person"); The New Century Dictionary of the English Language 271 (1944) ("New Century") (defining "clothes" as "[g]arments or coverings for the body"); The American College Dictionary 228 (1949) (defining "clothing" as "garments collectively; clothes; raiment; apparel" and "a covering"); Webster's Third New International Dictionary 428 (1986) ("Webster's Third) (defining "clothes" as "clothing," and "clothing" in turn as "covering for the human body or garments in general: all the garments and accessories worn by a person at any one time").

Oxford at 291.[8] Thus, the phrase "changing clothes," in the abstract, encompasses any act that "alter[s]" a "covering for the human body."

But § 203(o) does not simply refer to "clothes" or "changing clothes" in isolation. Rather, it refers to the activity of "changing clothes ... at *the beginning or end* of each *workday*." 29 U.S.C. § 203(o) (emphasis added). And it contemplates "changing clothes" that is significant enough to be a subject of a "collective-bargaining agreement applicable to the particular employee." *Id.*

These surroundings make clear that the "covering" contemplated by § 203(o) was the work outfit worn by an employee to be ready to work, and that the "alteration" contemplated was the activity of putting on or taking off this work outfit at the beginning and end of each workday. *See* Webster's Third at 1601 (defining "outfit" to mean "wearing apparel with accessories designed to be worn on a special occasion

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[8] *See also* Webster's Second at 448 (defining "change" as "[t] alter; to make different"); The American College Dictionary 201 (1949) (defining "change" as "to make different; alter in condition, appearance, etc."); New Century at 236 (defining "change" as "to make different; alter in appearance, condition, etc."); Webster's Third at 373 (defining "change" as "to make different in some particular but short of conversion into something else").

or in a particular situation or setting"). Thus, "changing clothes" in § 203(o) refers to the activity of donning and doffing the outfit worn by an employee to be ready to work.

Nor does the text of § 203(o) draw any distinction between changing into "ordinary" work outfits versus other outfits, such as those that are specialized or protective, or otherwise integral and indispensable to safely performing a principal work activity. Congress could easily have inserted a limiting modifier before "clothes." But it did not. *Cf. Central Bank of Denver, NA v. First Interstate Bank of Denver, NA*, 511 U.S. 164, 177 (1994) ("If, as respondents seem to say, Congress intended to impose aiding and abetting liability, we presume it would have used the words 'aid' and 'abet' in the statutory text. But it did not."); *Taylor v. United States*, 495 U.S. 575, 597 (1990) ("[I]f Congress had meant to include only an especially dangerous subclass of burglaries as predicate offenses, it is unlikely that it would have used the unqualified language [it chose].").

As a result, the unqualified phrase "changing clothes...at the beginning or end of each workday" is as broad as the various permutations of possible work outfits and donning and doffing procedures. Those permutations, in turn, reflect the myriad outcomes of collective bargaining between employers and employee representatives regarding the outfits that are necessary and appropriate in light of the practical realities of each workplace.

For example, in 1949, agencies and experts described a wide array of industrial work outfits, including many specialized and protective items (and,

not surprisingly, referred to these outfits as "work clothes" and protective "clothing.").

For example, in setting "Minimum Standards for the Safety and Health of Workers in Manufacturing Industries," the Department of Labor stated that:

> Suitable types of protective clothing in good condition shall be furnished to workers exposed to injury hazards from physical contact with materials, such as goggles for protection against flying objects or metal splashes, safety hats or helmets, and safety shoes for protection against falling objects, fire-resisting leggings for protection against molten metal, leather or asbestos aprons for protection against fire, gloves for protection against sharp edges, splinters or electric shocks, etc.

Department of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics, Issue 616, pp.309-11 (1936).[9]

In a later publication, the Department of Labor described "Practical Work Clothing for Women" to include "[s]afety hats," "gloves," "special safety shoes," "[l]eggings, spats, and aprons," a "special foot protector for girls, covering the ankle and top of the foot" and "[g]oggles." United States Department of Labor, Bureau of Labor Statistics, Handbook of Labor

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[9] *available at* http://goo.gl/kd1uo.

Statistics, Vol. 1, 525-26 (1941).[10] *See also* Department of Commerce, United States Bureau of Mines, *Protective Clothing In The Mining Industry* (1933) (describing "protective clothing in the mining industry" as including "goggles," protective hats made from "hard insulating material" and "other types of protective clothing" including "gloves, leggings or high-cut boots, and safety belts."); R.M. Little, *Protective Clothing for Men*, Safety Fundamentals 28-32 (1919)[11] ("Protective Clothing for Men") (describing "special protective clothing in industry" to include "asbestos gloves or mitts," "heavy gauntlet rubber glove[s]"; "heavy helmets," heat resistant leggings made of "chrome leather [or] asbestos," "safety belts," and "protective mask[s] ... worn by iron and cinder men" that were "made of wire cloth with adjustable cloth cap, and a full fireproof apron [*i.e.*, a hood] extending over the chest and protecting the neck."); J.T. Carpenter, *Working Clothes*, Factory, The Magazine of Management 402 (January 1914)[12] ("Working Clothes") (describing various "Working Clothes" used in manufacturing including "[s]teel bradded leather aprons," "special suits and shields for sand-blast operators," "respirators for workers in cotton mills," "leather leggings," and "special wearing apparel to meet special conditions").

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[10] *available at* http://goo.gl/yPz0C.

[11] *available at* http://goo.gl/7uldd.

[12] *available at* http://goo.gl/XzQqj.

As this Court has stated "time and again":

> courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "'judicial inquiry is complete.'"

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461-62 (2002) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992)).

When read in context as a complete sentence, § 203(o) unambiguously refers to the activity of donning and doffing the entire outfit worn by an employee to be ready to work.

B. The Purpose of § 203(o) And Structure Of The FLSA Confirm That Congress Intended "Changing Clothes" To Refer To The Activity of Donning and Doffing The Entire Outfit Worn By An Employee To Be Ready To Work.

Congress enacted § 203(o) only two years after it had enacted the Portal to Portal Act in response to "one of the greatest legal-economic controversies in American history." Linder, *supra*, at 54 (internal quotation marks omitted). As a result, Congress was familiar with the specialized and protective work outfits described above and worn in heavy industries that gave rise to the portal to portal controversies in industries such as mining and manufacturing. *See supra* at 3-5. Congress was also aware of the operation of the Portal to Portal Act, and its goal of allowing employers to exclude from the compensable workday time spent getting ready to work, as opposed to engaged in productive work.

Notwithstanding the Portal to Portal Act, however, the Department of Labor issued a guidance stating that donning and doffing some essential work outfits, and certain washing, might require compensation. In response, Congress enacted § 203(o), which empowers unions and employers *in all cases* to bargain over whether these activities will be excluded from the "hours for which an employee is employed." 29 U.S.C. § 203(o).

In light of this purpose, there is no basis to distinguish between any of the individual parts of a work outfit or between different kinds of work outfits. That is particularly clear for three related reasons.

First, there is no reason to think that Congress in 1949 deemed it sensible for unions to bargain over the compensability of putting on some parts of a work outfit, but not others. Congress would not have allowed unions to bargain over the compensability of putting on a jacket, but not a belt, or a hardhat. Nor would Congress have distinguished between changing into work outfits that are specialized and protective and changing into work outfits that are not. The purpose of § 203(o) was to allow the parties best situated to describe the work outfit (and who had historically dealt with the issue in the course of collective bargaining) to negotiate and to agree on whether the compensable workday would include the time associated with donning and doffing the outfit worn by employees to be ready for work at the beginning of the workday. Limiting § 203(o) to putting on and taking off only some parts of the outfit or to donning and doffing only "ordinary" work outfits would substantially undermine that purpose.

Second, distinguishing between donning and doffing different parts of a work outfit or different types of work outfits would mire courts in precisely the sort of fact-specific judgments that Congress intended to leave to the collective bargaining process. Section 203(o) does not directly preclude compensation for any particular changing (or washing) time but, rather, reflects a judgment that the practical implications of compensating for such time in industrial workplaces are complex and varied. "[E]mployers and employee representatives can tailor solutions at the bargaining table to fit their particular circumstances and ... negotiating parties can modify those solutions to address changing conditions." *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 218 (4th Cir. 2009).

For example, employees may be willing to trade off compensation for clothes changing and washing time in exchange for a higher hourly wage as well as the flexibility of not having to be "on the clock" while in the locker room, the shower, or traveling to their work stations. Indeed, Petitioners' union appears to have struck just such a bargain in this case. *See supra* at 12 & n.3. And employers would likely prefer this arrangement since having employees on the clock during these times could create difficult monitoring and enforcement problems. "Taking this issue out of the give-and-take of the collective-bargaining process and putting it in courts or agencies could preclude such flexible and mutually preferable agreements." *Sepulveda*, 591 F.3d at 218. And "courts and agencies would find themselves in a morass of difficult, fact-specific determinations if

they were ultimately charged with deciding whether and how much of this time was compensable." *Id.*

Third, although § 203(o) by its terms applies to all instances of "changing clothes," it is clear from the face of the Portal to Portal Act, and the 1947 Wage and Hour Division guidance, that § 203(o) was *especially* targeted at the donning and doffing of specialized and protective work outfits.

The Portal-to-Portal Act *already* precluded compensation for preliminary and postliminary activities, even without affirmative agreement from a union. *See supra* at 4-5. Thus, any time spent changing into a *non-specialized* outfit that was *not* a direct requirement of the job was already non-compensable. *See* 29 C.F.R. 790.7(g) (stating that changing clothes and washing up "when performed under the conditions normally present, would be considered 'preliminary' or 'postliminary' activities").

Accordingly, if § 203(o) were intended to have any effect at all, it was intended to apply to the donning and doffing of work outfits that might be deemed "integral and indispensible" to an employee's productive work. As this Court noted in *Steiner v. Mitchell*, the "clear implication" of § 203(o) "is that clothes changing and washing, *which are otherwise a part of the principal activity*, may be expressly excluded from coverage by agreement." 350 U.S. 247, 255 (1956) (emphasis added). Any contrary reading would violate the "canon that statutes should be read to avoid making any provision 'superfluous, void, or insignificant.'" *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1268 (2011) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

Of course, outfits that are essential to the performance of industrial jobs often differ from those worn on the street. In particular, a great deal of the outfits that are peculiarly required by industrial jobs include safety clothing (which may or may not be similar to street clothes). *See supra* at 28-30. Such items vary widely. But unless Congress believed § 203(o) would be largely redundant, it intended "changing clothes" to include the donning and doffing of this category of work outfits.

The legislative history further confirms that § 203(o) was directed at donning, doffing, and washing that otherwise might have been deemed principal activities. As described above, *supra* at 5-7, the Wage and Hour Division issued a guidance in 1947 suggesting that "[w]ashing up after work, like the changing of clothes" could be "so directly related to the specific work [of] the employee"—such as where "chemical plant[] workers are required to put on special clothing" to protect themselves from workplace hazards—that they would not qualify as a preliminary or postliminary activity. 29 C.F.R. §§ 790.7(g), 790.8(c); 93 Cong. Rec. 2297-98. Employers lobbied Congress to eliminate this potential source of liability. *See e.g.* Bakers Statement, *supra* at 1567, ("We feared then that this novel nomenclature—'preliminary', 'postliminary,' and 'principal' activities—would not prevent a recurrence of the extensive unintended liabilities at which the act was directed.... Our fears unhappily are supported by the subsequent 'interpretative bulletin' of the Wage and Hour Division.").

Section 203(o) was a direct response to the possibility recognized by the Wage and Hour Division

guidance that clothes changing could be "integral and indispensible," and hence compensable. Employers expressly identified the guidance as their reason for seeking the amendment. *Id.*; NAM Statement, *supra* at 394. When Representative Herter introduced the amendment that would eventually become 203(o), he made specific reference to the concerns of employers that "*some representative of the Department of Labor* may step into one of those industries and say ... [that] the employer must pay for back years the time everybody had considered was excluded as a part of the working day." 95 Cong. Rec. 11,210 (emphasis added). And Congress also enacted in the same package of amendments a provision expressly invalidating "[a]ny order, regulation, or interpretation of the Administrator of the Wage and Hour Division" if it was "inconsistent with the provisions of the [amendments]." 63 Stat. 920 (1949).

In sum, it could not be clearer that Congress used the phrase "changing clothes" to refer generally to the activity of donning and doffing any outfit worn to be ready to work, but *particularly* the donning and doffing of specialized and protective work outfits that otherwise could have been deemed a principal activity. The Court should accordingly follow the broad meaning of "changing clothes" mandated by the statutory text, context, and purpose, and hold that § 203(o) encompasses the donning and doffing of any outfit worn by an employee to be ready to work.

C. Interpreting § 203(o) To Encompass The Activity of Donning And Doffing The Entire Outfit Worn By An Employee To Be Ready To Work Provides A Clear, Easily Administered Rule, Consistent With Congress's Goal Of Deference To Collective Bargaining.

Applying the plain meaning of § 203(o) also produces an easily administered rule:

> "[C]hanging clothes" as used in § 203(o) encompasses the activity of donning the work outfit that the employee will wear so as to be ready for work at the beginning of the workday (and the doffing of that work outfit at the end of the workday).

It will generally be straightforward to determine when an employee is engaged in the activity of changing into his work outfit to be ready to work. Conversely, the activities that fall outside § 203(o) are also easy to determine. Certainly § 203(o) would not permit unions and employers to agree to exclude time spent by employees starting or operating machinery, and it is difficult to imagine anyone arguing otherwise. Employees put on each of the items at issue in this case in a locker room, as part of the outfit worn to be ready to work, before going to their work stations. The cloth jackets and pants, steel-toed boots, gloves, hoods, wristlets, and leggings all cover employees' bodies and must be worn by employees (depending on their duties) to be ready to work. As acknowledged in the 2008 BLA, between Petitioners' union and U. S. Steel, the parties have engaged in collective bargaining over "donning and doffing" the work outfit, which "include[ed] such

items as flame-retardant jacket and pants, metatarsal boots, hard hat, safety glasses, ear plugs, and a snood or hood." R.106-4 at 392.

Moreover, although the activities of donning and doffing hard hats, safety glasses, and earplugs at Gary Works is not at issue in this case,[13] those items are part of the work outfit that an employee will wear to be ready for work and, accordingly, are also within the scope of § 203(o). The simplicity of this analysis demonstrates the administrability of the foregoing rule.[14]

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[13] The district court held, and the Seventh Circuit agreed, that the time spent donning hard hats, safety glasses, and earplugs was *de minimis*. Petitioners did not seek certiorari on these points. Pet. 3. Moreover, the district court concluded based on ample evidence in the record that respirators are not donned at the beginning of the day, but, rather, are donned during time for which employees are already compensated. Pet. App. 21a; J.A. 80. That is not surprising since it would presumably be uncomfortable and unnecessary to wear a breathing apparatus during one's walk from a locker room to a work station. Accordingly, respirators are donned and doffed during time that is *already* compensated.

[14] Some parts of the work outfit might not themselves be "coverings for the human body," but putting them on would still be part of the *activity* of "changing clothes" under 203(o). For example, cufflinks are not a "covering for the human body" but putting on cufflinks would obviously be part of "changing clothes" for an employee who wore french cuffs. Similarly, the activity of changing

Reading § 203(o) to encompass the activity of donning and doffing the entire work outfit thus creates a clear outer limit and empowers unions to engage in collective bargaining regarding the compensability of donning and doffing within that limit. No employee would necessarily go uncompensated for clothes changing covered by § 203(o). Rather, the parties best positioned to address the complexities of their particular workplaces would be free to negotiate the terms that best suit the interests of employees and employers. And courts would be less likely to become embroiled in second guessing these judgments. "This sort of fact-intensive determination has classically been grist for the mill of collective bargaining, and Congress ensured that employers and unions could keep it that way by enacting Section 203(o)." *Sepulveda*, 591 F.3d at 211.

As Representative Herter explained, because "what is to constitute a working day" in a unionized workplace has been "carefully threshed out between the employer and the employee," § 203(o) was intended to "give sanctity once again to the collective-

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clothes for a basketball referee includes not only donning a striped shirt, but also putting a whistle around the neck. Generally, the time spent specifically on donning and doffing such accessories is likely to be *de minimis*, but such items are often an essential part of the work outfit. In this case, such items are no longer at issue in any event. *See supra*, at 38, n.13.

bargaining agreements as being a determining factor in finally adjudicating that type of arrangement." 95 Cong. Rec. 11,210.

II. PETITIONERS' ASSERTION THAT "CLOTHES" DOES NOT INCLUDE PROTECTIVE WORK CLOTHING ARBITRARILY NARROWS THE STATUTORY TEXT, IGNORES THE CONTEXT AND PURPOSE OF § 203(o), AND WOULD CREATE AN UNWORKABLE STANDARD.

Petitioners ask this Court to hold that § 203(o) should not apply to the donning and doffing of "clothes" that are specially designed to be protective in the workplace.

As a threshold matter, Petitioners improperly attempt to analyze the words "changing" and "clothes" separately and in isolation, without addressing the clear meaning of the singular phrase "changing clothes" in context. That approach is fundamentally misguided, *Smith*, 508 U.S. at 233, and causes Petitioners to ignore that § 203(o) does not focus on the compensability of wearing particular *items* (*i.e.*, "clothes") but, rather, focuses on the compensability of a particular *activity*—"changing clothes ... at the beginning or end of each workday." Petitioners do not even attempt to argue that the process of donning and doffing the jackets, pants, boots, gloves, hoods, wristlets, and leggings at issue in this case is not part of the *activity* of "changing clothes...at the beginning or end of each workday."

Moreover, even on its own terms, Petitioners' atomistic approach provides no affirmative definition of "clothes," arbitrarily departs from the statute's plain text, ignores the purpose of § 203(o), and would create an unworkable standard.

A. Petitioners' Argument That "Clothes" Excludes Protective Work Clothes Is Contrary To The Plain Text Of § 203(o).

As shown above, the plain, ordinary definition of "clothes" encompasses any "covering for the human body." *See supra* at 26 & n.6. In an attempt to avoid this definition, Petitioners simply attempt to engraft a limitation on the meaning of the word "clothes" as used in 203(o), asserting that the provision does not apply to the donning and doffing of "protective clothing." Petr. Br. 49-50. Yet, although Petitioners argue at length that clothing can have different meanings in different contexts, *none* of those various contexts would support defining "clothes" to exclude all protective clothes. Some clothing may not be protective. But a vast amount of clothing is. As the Court of Appeals noted, "[p]rotection-against sun, cold, wind, blisters, stains, insect bites, and being spotted by animals that one is hunting—is a common function of clothing." Pet. App. 6a. Accordingly whether or not something is protective simply does not define whether it is clothes. "The adjective 'protective' does not deprive 'clothes' of their fundamental character." *Andrako v. U. S. Steel Corp.*,

632 F. Supp. 2d 398, 410 (W.D. Pa. 2009) (internal quotation marks omitted).[15]

Perhaps recognizing the oddity of asserting that clothing cannot be designed and worn for protection, Petitioners retreat to the position that the term "clothes" cannot include items that "are used to protect an employee against *workplace* hazards and are designed to provide such protection." Petr. Br. 17. (emphasis in original). In other words, although "ordinary" protective clothes are obviously clothes, *specialized* protective clothes are not.[16]

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[15] Indeed, even the sources cited by Petitioners undermine that position. For example, Petitioners note that Webster's Second defines clothes as "covering for the human body; vestments; venture; a general term for whatever covering is worn, or is made to be worn *for decency or comfort*." Petr. Br. 33 (quoting Webster's Second New International Dictionary, 507 (1948)). But what is protective clothing but clothing that is worn "for comfort?" Sunburn, frostbite, blisters, and industrial accidents are uncomfortable; we protect against them for our comfort. *See also* Petr. Br. 33 ("'Clothes ... *defend* us from the inclemencies and vicissitudes of climate and season ...'") (quoting Aileen Ribiero, The Art of Dress: Fashion in England and France 1750-1820, 3 (1995)) (emphasis added).

[16] Petitioners avoid the word "specialized," but this is the unavoidable implication of their argument. Petitioners cannot contend that specialized protective clothes remain "clothes" in other non-work contexts, and that only

Petitioners attempt to support this distinction through an extended discussion of hypotheticals regarding what "we *most often* describe as clothes." Petr. Br. 19 (emphasis added). These general hypotheticals—involving everything from shopping tourists (Petr. Br. 32), to a person alighting from a shower (*Id.* at 33), to magic cloaks (*Id.* at 36, n.31)—have nothing to do with the specific context of § 203(o). But the distinction between clothes and specialized and protective clothes fails even as a conceptual matter.

Clothes are often designed or tailored for a particular use, yet this specialization does not mean they are no longer clothes. Pants are pants, whether they are camouflaged, or waterproofed, or made from aluminized fabric, or sprayed with a flame-retardant chemical. Like the adjective "protective," the adjective "specialized" does not deprive clothes of their essential character. As a result, Petitioners' position cannot be reconciled with common usage of the word "clothes." As shown above, *supra* at 28-30, it is both natural and common to refer to specialized and protective clothes as "clothes."

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specialized and protective *work* clothes cease to be "clothes." If specialized work clothes are not "clothes," there is no principled basis to argue that specialized hiking clothes, or skiing clothes, or fishing clothes remain "clothes." Thus, Petitioners' argument must be that clothes cease to be clothes whenever they are specialized and protective in *any* context.

When the term "clothes" is understood in light of "the broader context of the statute as a whole," *Caraco Pharm. Labs.*, 132 S. Ct. at 1680, Petitioners' distinction is even more untenable. As described above, § 203(o) contemplates the donning and doffing of work clothes that could be deemed integral and indispensable to a job. When asked to describe what "clothes" are so essential in an industrial setting that a worker could not start work without them, one would surely think of specialized protective clothing.[17]

Petitioners' suggestion that the answer would have been different in 1949, Petr. Br. 44, is wrong. Workers in 1949 wore precisely the same sorts of specialized and protective outfits as the clothing at issue in this case. *See supra* at 28-30. *See also Protective Clothing for Men*, *supra* at 32 (1919) ("The use of special protective clothing in industry is increasing"); *Protective Clothing in the Mining Industry* at 1 (1933) ("[T]he idea [of protective clothing in the leading industries] has grown rapidly").

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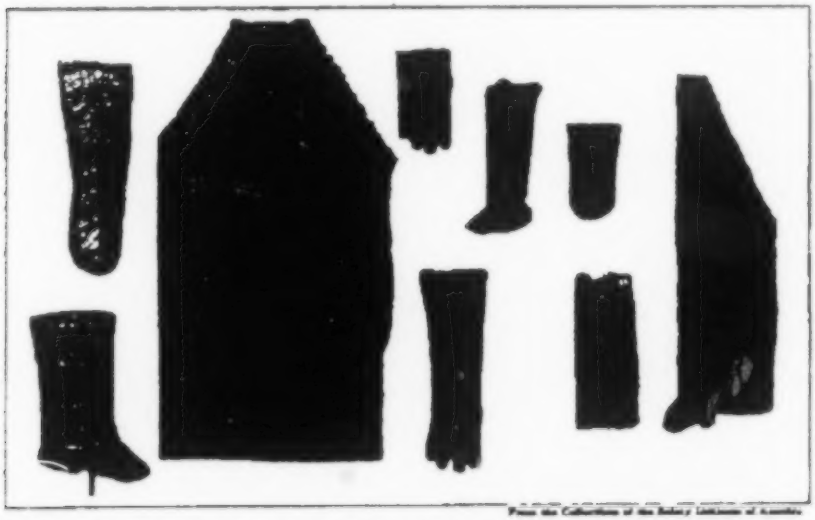
[17] Section 203(o) also refers to changing clothes in tandem with "washing," and when Congress in 1949 thought of work clothes used in industrial jobs that required washing up after work, it certainly would have contemplated specialized and protective work clothes. *See* Pet. App. 6a ("[W]orkers who wear work clothes for self-protection in a dangerous or noxious work environment are far more likely to require significant time for washing up after work than a waiter.").

Indeed, publications at the time described the following work outfits (and referred to them as "clothes," "garments," and "clothing"):



From the Collections of the Safety Institute of America

Asbestos Garments for the Protection of Workers Exposed to the Hazards of Molten Metal and High Temperatures

Mask of Wire Cloth with Adjustable Cap and Apron over Neck and Chest for Protection in Babbitting and Similar Operations

Protective Clothing for Men, *supra* at 38, 40.

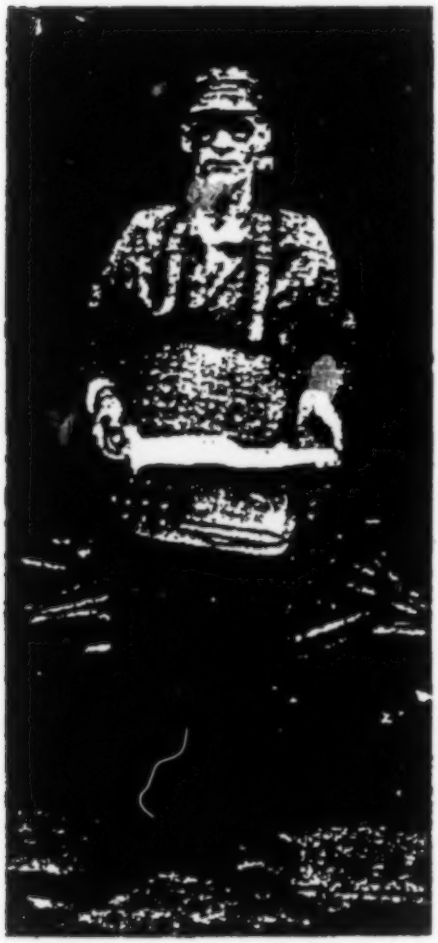


FIGURE I: *Steel-bradded leather aprons are worn by casting grinders at the American Steel Foundries to protect the abdomen from vibrations*

Working Clothes *supra* at 402.

Special protective clothing is of course more technologically advanced now than in the past. But that hardly places it outside the definition of "clothes" or any analysis of the scope of § 203(o).

Petitioners also engage in a tortured chain of semantic speculation in an attempt to establish the bizarre proposition that the term "clothes"

necessarily excludes "protective clothing." These arguments are plainly flawed.

For example, Petitioners note that, in some electronic databases, the term "protective clothing" is more common than the term "protective clothes" and ask the Court to infer that the phrase "changing clothes" necessarily excludes "protective clothing." Petr. Br. 48-49. But anything that is "clothing" is obviously also "clothes"; the term "clothes" includes all forms of "clothing." *See, e.g.*, Websters Second (defining "clothes" to mean "clothing"). Congress's word choice simply reflects that, even if one is specifically contemplating protective clothing, it is still awkward to refer to employees "changing clothing." Indeed, if one employs Petitioners' own methodology, a Westlaw search of all federal cases for "changing clothing" returned only 15 results, while the same search for "changing clothes" (excluding cases that discuss the FLSA) returned 274 results.[18]

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[18] Petitioners' argument reflects, once again, the error of reading the word "clothes" in isolation rather than focusing on the singular phrase "changing clothes." Only by reading individual words in isolation can Petitioners suggest that it was odd for Congress to have chosen the word "clothes" as part of the phrase "changing clothes." The prevalence of "changing clothes" rather than "changing clothing" may reflect that it is unusual, and therefore sounds odd, for two neighboring words to both end in "ing." Whatever the reason, however, the everyday phrase "changing clothes" is clearly the natural word

Petitioners next claim that "dictionaries in fact treat the phrases 'work clothes' and 'protective clothing' as nonoverlapping" because Webster's Third and two other modern dictionaries define "blue collar" as a involving duties that call for "work clothes *or* protective clothing." Petr. Br. 50 (emphasis added by Petitioners). The term "blue collar" has no connection to the statutory text, context, or legislative history of § 203(o), and is therefore not instructive of the meaning of the term "changing clothes" in this case. But Petitioners' definition fails even on its own terms. The same dictionaries cited by Petitioner note that "or" can be used to "indicate ... the *equivalent or substitutive* character of two words or phrases" *See* Webster's Third at 1585 (emphasis added). And that is precisely the manner in which these dictionaries use "or" in their definitions—listing two overlapping or synonymous terms to flesh out the meaning. *See, e.g.*, Webster's Third at 1822 (defining "protect" as "to cover *or* shield from that which would injure, destroy, *or* detrimentally affect) (emphasis added); *id.* at 1155 (defining "industry" to mean "diligence in an employment *or* pursuit; especially: steady *or* habitual effort") (emphasis added). Thus, assuming *arguendo* that the modern definition of "blue collar" were relevant to the meaning of § 203(o), that definition only confirms that the term "work clothes" is

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choice to describe donning and doffing protective work clothes.

naturally associated with the term "protective clothing."

In short, Plaintiffs ignore the plain meaning of § 203(o) when read as an integrated whole—"changing clothes ... at the beginning or end of each workday." Rather than recognizing that this text refers to the *activity* of donning and doffing a work outfit, they attempt to engraft arbitrary exclusions onto the isolated word "clothes." As described below, the resulting approach is not only an untenable reading of the statutory text, but is also irreconcilable with the purpose of § 203(o).

B. Petitioners' Proposed Exclusion Of Protective Work Clothes Is Contrary To The Purpose of § 203(o).

Petitioners offer no explanation for why Congress would have wanted to distinguish between donning and doffing special protective clothes as opposed to non-specialized, non-protective clothes. As described above, there is no reason to believe Congress would have wished unions to be able to engage in collective bargaining over changing time for some parts of a work outfit, but not others. *See supra* at 32. Moreover, distinguishing between certain work outfits, or certain parts of work outfits would have undermined Congress's goal of deferring to collective bargaining over whether time spent changing to get ready for work should be part of the compensable workday. *Id.* at 33-34.

In fact, Petitioners' approach gets the purpose of Congress precisely backwards. In enacting § 203(o), Congress was targeting clothes changing that could be deemed "integral and indispensible" to industrial

jobs. In particular, it was specifically addressing the possibility, identified in the Wage and Hour Division guidance, that the Portal to Portal Act would not eliminate the obligation to compensate employees for "activities such as putting on *special* clothes ... before or after work." NAM Statement, *supra* at 394 (emphasis added); *see also* 29 C.F.R. § 790.8(c) (citing statement of Senators Cooper and McGrath that employers would have to compensate "chemical plant[] workers [who] are required to put on *special* clothing and to take off their clothing at the end of the day") (emphasis added). As a result, Congress was clearly contemplating the donning and doffing of specialized and protective work clothes when it addressed the activity of "changing clothes" so as to be ready for work.

Petitioners' contrary reading would lead to the surprising proposition that Congress, legislating in 1949, had drafted § 203(o) so that it did *not* apply to the primary industries that gave rise to the portal to portal controversies. As described above, workers in the mining and metal industries wore special protective clothing. *See supra* at 28-30. Yet, under Petitioners' view, § 203(o) would exclude these industries and apply only to industries such as baking.

If Congress had intended to distinguish between different types of "indispensible clothes", and create a special rule for heavier protective clothes in the steel industry, it would have made some reference to this distinction. *Cf. Central Bank of Denver, NA*, 511 U.S. at 177. But that distinction cannot be found anywhere in the text or legislative history of § 203(o), or in the text or legislative history of the Portal to

Portal Act. Instead, the crucial distinction discussed in Congress during the two years leading up to § 203(o) was the one identified in the text of the Portal to Portal Act—that between changing clothes as a preliminary or principal activity. Statement of Senator Cooper, 93 Cong. Rec. 2297 (1947); Colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350 (1947).

Petitioners at times imply that employers should not be permitted to avoid compensation for activities that employees cannot avoid. *See* Petr. Br. at 5-6 (emphasizing that the clothing at issue in this case is required by various regulations as well as the BLA, and that "[a] worker's failure to wear the required PPE can and does lead to disciplinary action."). Yet this is the precise policy intuition that was embodied in the Wage and Hour Division's 1947 guidance, and which was *rejected* by § 203(o). The fact that some work outfits may be essential, unavoidable, or specialized is the very reason Congress enacted § 203(o), not a basis for arbitrarily limiting it.

Petitioners and their *amici* ignore this same point when they rely on sources that distinguish between protective work clothes required by the job and "everyday clothing," Petr. Br. 57. For example, Petitioners suggest that "clothes" in § 203(o) should be defined based on OSHA regulations (promulgated 25 years after § 203(o)) that "delineate[] the types of protective items that a covered employer must provide [at the employer's cost] to safeguard workers against those hazards." Petr. Br. 57-58 (citing 29 C.F.R. part 1910, subpart I). As discussed, however, the fact that protective clothing is so related to special workplace hazards that OSHA determines

that such protective clothing should be paid for by the employer means it was *precisely* what Congress intended to cover in § 203(o).

Similarly, Petitioners' *amici* rely on decisions of the War Labor Board in 1944 and 1945. Union Amicus at 14-15. As a threshold matter, there is not a shred of evidence that Congress considered these decisions when it enacted the 1949 amendments to the FLSA. To the contrary, every discussion in the legislative history of § 203(o) identifies the Wage and Hour Division's 1947 guidance as the motivation for the provision. More, fundamentally, however, *amici* fail to explain why Congress would have passed § 203(o) in order to allow unions to bargain only over the "'purely personal activity' of changing from 'ordinary street clothes' to work clothes." *Id.* (quoting *Big Four Meat Packing Cos.*, 21 War Labor Rep. 652, 672 (1945)). If that were Congress's aim, there would have been no need to enact § 203(o) at all.[19]

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[19] For the same reason, the guidance letter issued by the Department of Labor in 2010 clearly misinterprets § 203(o). *See* U.S. Dep't of Labor, Administrator's Interpretation No. 2010-2, 2010 WL 2468195 (June 16, 2010). That guidance concludes that § 203(o) does *not* apply to the donning and doffing of any clothes that are "required by law, by the employer, or due to the nature of the job." *Id.* That rule would render §203(o) a complete nullity, as activities that are not "required by law, by the employer, or due to the nature of the job" are not even "work" under the broad definition of that term established

The closest Petitioners come to a rationale for their distinction between specialized protective clothes and other clothes that could be deemed integral and indispensible is to invoke the maxim that "exemptions from the [FLSA] are to be narrowly construed" against employers. *Moreau v. Klevenhagen*, 508 U.S. 22, 33 (1993); Petr. Br. 52. But § 203(o) is a *definitional* provision, not an "exemption," and, in any event, the canon of narrow construction cannot justify Petitioners' position here.

First, even if it were proper to construe the definitional provisions of the FLSA narrowly in deciding a close case, this is not a close case. No canon of interpretation justifies the atextual and arbitrary exclusion Petitioners seek.

Second, putting a thumb on the interpretive scales is wholly inappropriate where, as here, Congress expressly narrows the scope of a general statute as a definitional matter. The canon cited by Petitioners has been applied only to the "exemptions" contained in § 13 of the FLSA, 29 U.S.C. § 213. Section 203(o) instead appears in the "definitions" section of the FLSA. And this Court has explicitly stated that the canon is "inapposite where, as here, we are interpreting a general definition" provision in the FLSA." *Christopher v. SmithKline Beecham Corp.*,

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by the Court prior to the Portal to Portal Act, let alone principal activities.

132 S. Ct. 2156, 2172 n.21 (2012). The canon is all the more inappropriate in this case given that § 203(o) was enacted by a later Congress and was part of a package of amendments aimed at confining the reach of the FLSA.

Third, even if it were appropriate to narrowly construe definitional provisions of the FLSA that restricted the statute's remedial purpose, a natural reading of § 203(o) does *not* undermine the FLSA's remedial goal—protecting individual employees who may lack bargaining power, *Barrentine*, 450 U.S. at 739. Section 203(o) does not deprive any employee of compensation; rather, it merely grants greater bargaining flexibility to union represented employees to address in a collective bargaining agreement the realities of their specific workplace.

Petitioners also claim that a statement of Representative Herter "pointed to the clothes-changing of bakery workers as the paradigm to which his legislation was addressed." Petr. Br. 46 (citing 95 Cong. Rec. 11,210). But the cited passage does not support that claim. As quoted above, *supra* at 8-9, the testimony merely states that the amendment would be helpful "[i]n the bakery industry, *for instance*." 95 Cong. Rec. 11,210 (emphasis added). Neither this statement, nor the testimony of the Bakers Association to which it refers, *see supra* at 6, 35 (let alone the statutory text) hints at any distinction between bakers changing into their work clothes and other industrial employees changing into theirs. Representative Herter's comments went well beyond the baking industry and argued for § 203(o) as a way "to give sanctity once again to the collective-bargaining agreements as being a determining factor

in finally adjudicating" the scope of the compensable workday. 95 Cong. Rec. 11,210.

Similarly, Petitioners' view finds no support in the fact that Congress enacted § 203(o) in favor of an earlier bill that would have allowed unions and employers to exclude any activity from the workday. That choice simply reflects a decision to limit § 203(o) to time spent donning and doffing a work outfit and washing—the specific activities that had been discussed in the Wage and Hour Division guidance and among industry groups, and had long been subject to collective bargaining. It does not, as Petitioners and their *amici* assume, mean that Congress wanted the amendment to be as narrow as possible, without regard to its text.

C. Petitioners' Suggestion That "Changing Clothes" Means Only "Substituting Clothes" Ignores The Primary Definition Of The Text, Conflicts With The Statute's Purpose, And Would Impose An Unworkable Rule.

Although the primary dictionary definition of "changing" is "to render different, alter," Shorter Oxford at 291, Petitioners suggest that "changing clothes" in § 203(o) is limited to situations in which an employee *substitutes* one set of clothes with another. Petr. Br. 22-28. Once again, however, Petitioners attempt to disregard the ordinary meaning of a statutory term where the context forecloses rather than supports their alternative definition.

It is entirely natural to refer to the donning and doffing of a *work outfit* as "changing" into and out of work clothes. A worker "changes" into and out of a

hazmat suit or heavy coat whether or not he removes another article of clothing.

Moreover, Petitioners' definition quickly becomes unworkable and nonsensical in practice. Petitioners presumably would not contend that an employee changes clothes only when he or she replaces *every* article of clothing with a different, corresponding article. Someone who changes out of his suit when returning from an office job is clearly "changing clothes" even if he does not replace his undershirt. Thus, Petitioners position must essentially be that, in order for a worker to "change" clothes, he or she must first remove at least *one* article of clothing.

Under that definition, however, whether donning and doffing is excluded from "hours worked" under § 203(o) would turn on the highly variable and utterly inconsequential question of whether a worker first removes an article of clothing. If a worker removes a sweatshirt or street shoes before putting on his work outfit, he would be changing clothes under Petitioners' definition. But if the same worker came to work in shorts, a t-shirt, and work boots, and donned his work outfit over this attire, his changing time would be considered beyond the scope of § 203(o).

Moreover, by focusing on the word "changing" in isolation—as opposed to the singular phrase "changing clothes" in its statutory context—Petitioners' approach would require intensive fact finding over which employees removed an article of street clothing, and on which days. And two workers who engaged in essentially the same activities could be paid differently if one of them wore a sweatshirt to

work and the other did not. That would be wholly arbitrary. There is no reason to think Congress would have intended employees to be in a different position under the Act based on whether they removed an article of clothing before donning their work outfit.

Perhaps recognizing that it would be unworkable and implausible to conclude that Congress meant "changing clothes" to mean "substituting clothes," Petitioners do not actually ask for the logical result of their position—a holding that reversal is warranted because, even if the items at issue were clothes, they were not "changed." Rather, Petitioners assert that the "clothes" in § 203(o) should not include specialized and protective clothes because such clothes in 1949 were "put on over a worker's clothes" and "generally only ordinary work clothing" would involve substitution of clothes. Petr. Br. 28.

This argument is equally flawed. First, as just demonstrated, Congress did *not* use "changing clothes" to mean substitute. Rather, Congress used the phrase to refer to the donning and doffing of work outfits, particularly the donning and doffing of work outfits that could be deemed integral and indispensable to the employee's job. Accordingly, there is no reason to interpret clothes to be limited to those items that are always substituted.

Second, Petitioners offer no citation for their claim that workers in 1949 did not remove some of their street clothes before donning protective work clothing (Petr. Br. 28), and that claim is inherently implausible. As shown above, a wide range of specialized and protective clothing was in use in

1949. *See supra* at 28-30, 45-46. Surely some workers, particularly those who wore warm jackets to the factory in winter, or worked in hot environments in the summer, stripped off some articles of clothing before donning their protective work clothes. Similarly, the record shows that many of the workers at the Gary Works remove their street clothes before changing into their work clothes, all of which had analogs in 1949.[20] Thus, even assuming that "changing" meant "substituting" to some degree, there is no basis for Petitioners' claim that only non-protective clothes are or can be substituted.

---

[20] Employees at U. S. Steel often wear "greens" in place of street clothes; indeed, some workers wear them even when their position does not require it. R.85 at 339-40, 346. Some employees are also required to shower at the end of the day, or choose to do so for their own convenience, after which they dress in clean clothes not worn while working. For example, Petitioner Sandifer "always wears a nice shirt and tie and nice jeans and a hat [and] spends a good deal of time after his shift putting on this clothing." R.85 at 338. *See* also R.85 at 346 ("After changing, [Petitioner] Jenkins would put his personal clothes back on and leave the facility."); J.A. 83 (employees working at the Coke Plant are provided with a locker that provides, by way of a partition, for the separation of work clothes and street clothes"); R.85 at 372 ("In the event that [Stock Unloaders] elect[to wash up], and I think that most do, washing facilities and showers are provided"); J.A. 76-77 ("The Company provides over 50 wash houses and wash and locker facilities throughout the plant").

D. Petitioners' Approach Would Make The Meaning Of § 203(o) More Uncertain, Not Less.

A recurring theme of Petitioners' argument is that their exclusion of protective work clothes should be adopted because it reduces the ambiguity of the phrase "changing clothes." As described above, *supra* at 24-36 "changing clothes" as used in § 203(o) is *not* ambiguous—it plainly refers to the activity of donning and doffing the entire outfit worn by an employee to be ready to work. The ambiguity cited described by Petitioners is a result of failing to read § 203(o) in context as a complete sentence and instead asking what items an English speaker, *unaware of any context*, might consider somehow similar to *everyday, commonplace* "clothes." Petr. Br. 34-42. Even if this context-free, "everyday clothes" test were the only alternative, however, Petitioners' view would only add to the uncertainty.

Because Petitioners have done nothing to define "clothes," their position would still require a court to address whether an English speaker would consider items such as a hairnet, a chef's hat, or a tool belt to be sufficiently similar to everyday clothes. These items are not protective in the sense Petitioners use the term,[21] but Petitioners would likely contend that

---

[21] A hairnet and a chef's hat do not necessarily protect the worker, but they could be said to protect the product or customer.

these items are not clothes. Thus, Petitioners' position that "clothes" are *not* specialized and protective clothes leaves unanswered the question of what "clothes" *are*.

Unlike a litigant who argues for one of several definitions on the ground that their definition would be easier to administer, Petitioners simply try to reduce the number of cases in which clothes must be defined by ignoring a large category of clothes. One could just as easily reduce the workload of courts by excluding from § 203(o) any clothes made of synthetic fibers, or clothes that are pink (presumably both of these were less common in 1949). Or one could only apply § 203(o) to cases filed on Mondays. But such arbitrary, counter-textual exclusions are not a proper means of avoiding interpretive questions.

Moreover, Petitioners' arbitrary limit does not even have the value of clarity that Petitioners promise. Unlike determining whether clothes are "synthetic" or "pink," it is not at all clear what clothes are specialized and protective enough to fall within Petitioners' exclusion. Are a pair of coveralls specialized and protective enough to cease being clothes when marketed for their durability and ability to protect from burns? Work pants with padded knees? A reflective jacket designed for workers repairing roads or working around mobile equipment? "Because many work clothes are protective to some extent, the distinction urged ... by the employees would be difficult, if not impossible, for courts to administer in a consistent and coherent manner." *Sepulveda*, 591 F.3d at 215. Petitioners' position thus adds additional line drawing questions while leaving the definition of "clothes" unresolved.

This ambiguity is particularly untenable in light of the need for unions and employers to have clear ground rules for collective bargaining. The very purpose of § 203(o) was to allow the parties to negotiate and agree over whether the activity of "changing clothes" would be included as part of the compensable workday. By engrafting exceptions, limitations, and novel restrictions onto the statutory text, Petitioners approach would defeat not only this statutory purpose, but render the statute unworkable from a practical point of view.

As this Court has said:

> [W]here the words of a law ... have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law, and a dictate of common sense; for were a different rule to be admitted, *no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest upon his own understanding of a law*, until a judicial construction of those instruments had been obtained.

Green v. Biddle, 21 U.S. (8 Wheat) 1, 89-90 (1823) (emphasis added).

For the foregoing reasons, there is no justification for reading an atextual exception for specialized and protective work clothes into § 203(o). Rather, reading "changing clothes" to refer to the activity of donning and doffing the entire outfit worn by an employee to be ready to work is the only approach that provides a workable definition consistent with the text, structure, and purpose of § 203(o).

III. THE ITEMS AT ISSUE IN THIS CASE ALL FALL WITHIN § 203(o) UNDER *ANY* DEFINITION OF "CLOTHES."

As described in Part I, § 203(o) refers to the activity of "changing clothes"; specifically, donning the entire work outfit that the employee will wear so as to be ready for work at the beginning of the workday (and doffing that outfit at the end of the day). It is therefore not necessary or appropriate when applying § 203(o) to consider each individual part of the work outfit. *See supra* at 38-39 n.14.

However, if the Court declines to read "clothes" in § 203(o) as a part of the activity of donning a work outfit as a whole, there are only two approaches to defining the term "clothes."

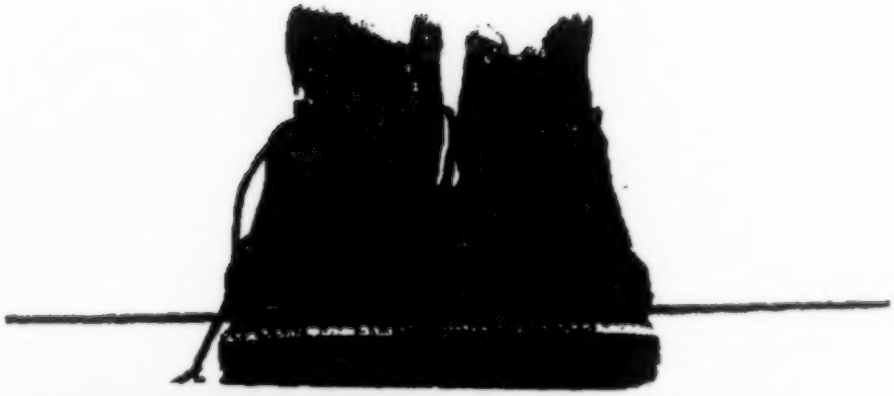
As described above, Petitioners actually offer no definition of "clothes" at all, attempting instead to argue that certain clothes are *not* in fact "clothes." However, one alternative approach would be to define "clothes" according to its dictionary definition—as any "covering for the human body"—and simply apply that definition on an item-by-item basis. Thus, putting on any part of a work outfit that is a covering for the human body would be part of changing "clothes," but putting on parts of the work outfit that are not themselves a body covering would *not* be part of changing "clothes."

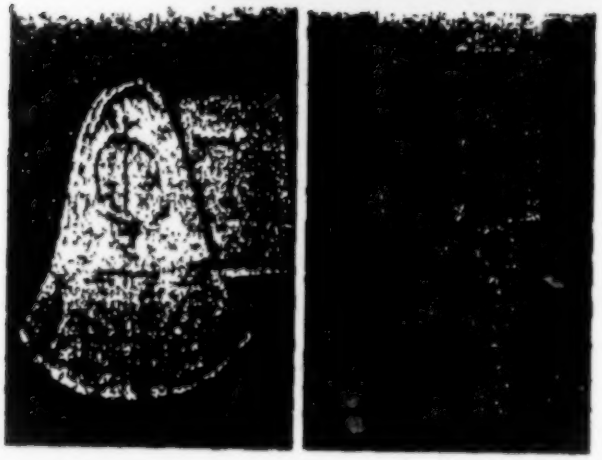
A second alternative would be to define "clothes" to include any item that an English speaker, unaware of any context, might consider somehow similar to everyday, commonplace "clothes." This approach would still include specialized and protective clothes, since no English speaker would think these

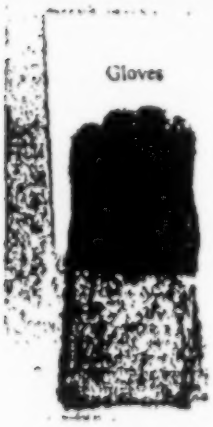
adjectives cannot describe clothes; however, it would limit clothes to those items that are intuitively similar to commonplace clothes.

Under either approach, the items at issue in this case would still be clothes. The record contains detailed descriptions, exemplars, and pictures of each of these items, J.A. 77-81, R.85 Ex. 4, R.85 at 262-265. Photographs from the record of the items at issue are reproduced below:

Metatarsal
Shoes







A. The Items In This Case Are All Clothes Because They Are All "Coverings For The Human Body."

For the same reasons that Congress intended "clothes" to refer to the entire work outfit, Congress would certainly have intended "clothes" to encompass any part of a work outfit that was itself a "covering for the human body." Nothing in the statutory text indicates that Congress intended to limit this broad, ordinary meaning. *See supra* at 28. And the statutory structure and purpose make clear that Congress, at a minimum, intended the term "clothes" to encompass specialized and protective work clothes, the donning and doffing of which was integral and indispensible to an employee's job. *Id.* at 34-36.

Moreover, just as it would be straightforward to determine whether an item is part of the outfit worn to be ready to work, it also would be straightforward to determine whether an item is worn as a "covering for the human body." And in all events, it is far more administrable than the approach urged by Petitioners. *Id.* at 37-40.

The jackets, pants, boots, gloves, hoods, wristlets, and leggings at issue in this case are obviously "coverings for the human body." Moreover, although the status of a respirator, hard hat, glasses, and earplugs are not at issue in this case, *supra* at 38 n.13, these items, too, are plainly "coverings for the

human body." Indeed, *every* circuit to have addressed this standard has recognized that items such as the clothes above fall within that definition.[22]

B. The Items In This Case Are Also Materially Indistinguishable From Everyday, Commonplace Clothes.

Even if "clothes" is limited to items that an English speaker, unaware of the statutory context, might consider similar to commonplace clothes, the items at issue in this case are still "clothes."

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[22] *See Salazar v. Butterball, LLC*, 644 F.3d 1130, 1139 (10th Cir. 2011) ("The ordinary meaning of 'clothes' would appear to encompass all the items of PPE worn by plaintiff [meat processors]."); *Franklin v. Kellogg Co.*, 619 F.3d 604, 614 (6th Cir. 2010) (recognizing that "hair and beard nets, goggles, ear plugs, nonslip shoes, and a bump cap—are also properly construed as clothes [because e]ach of these items provides covering for the body."); *Sepulveda*, 591 F. 3d at 215 (noting that "shoes, smocks, aprons, gloves, and sleeves" as well as "bump caps, ear plugs, hairnets, arm shields, and glasses" all "serve as 'covering'"); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 950, 956 (11th Cir. 2007) (holding that "smocks, hair/beard nets, gloves, and hearing protection" all "fit squarely within the commonly understood definition of 'clothes' as that term is used in § 203(o)."); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003) (acknowledged the defining clothes based on its dictionary definition "would embrace ... metal-mesh leggings, armor, space-suits, riot gear, or mascot costumes").

"Greens" are cloth garments that are not materially different from any ordinary pants and jacket. J.A. 78-79. Likewise, the boots and gloves worn at the Gary Works are not materially different from the boots and gloves one would find in a sporting goods store. *Id.* The snood is effectively a balaclava, R.85 at 261, 265, the wristlets are essentially long wristbands or detachable sleeves, R. 85 at 265, and the leggings are simply protective leggings worn around the ankles. J.A. 79; R.85 at 265. As stated by the court in *Andrako*, a case that involved the same items of clothing as are at issue in this case, "by description, look, feel, purpose, fit, and basic common sense, the items at issue are 'clothes' within any reasonable meaning of Section 203(o)." 632 F. Supp. 2d at 410-11 (internal quotation marks omitted).

To be sure, each of these items is treated with flame retardant chemicals and/or made from special fabric. J.A. 77-81. However, as described above, the fact that clothes are specialized or protective does not change their essential character. No English speaker would stop calling pajamas clothes because they have been treated with a flame retardant, or conclude that a jacket is not clothes if made from aluminized fabric.

Nor is it relevant if, as Petitioners claim, some English speakers might not at first know that leggings and wristlets are worn around the legs and arms. Petr. Br. 40-41. There are many forms of unusual clothes, with which some English speakers may not be familiar. For example, someone not familiar with a sari from South Asia might not realize that the long, rectangular bolt of cloth is in fact a piece of finished clothing. Yet, when informed

that leggings, wristlets, and a sari are all pieces of fabric that are worn wrapped around parts of the body for decency or comfort, any English speaker would realize that these items are all clothes.

CONCLUSION

For the foregoing reasons, this Court should hold that the donning and doffing of work outfits in this case is "changing clothes" under Section 203(o) and affirm in relevant part the judgment below.

Respectfully Submitted,

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In The
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CLIFTON SANDIFER, *et al.*,

Petitioners,

v.

UNITED STATES STEEL CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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INTRODUCTION

The respondent and the United States advance decidedly different interpretations of section 29 U.S.C. § 203(o). Respondent contends that the "clothes" to which section 203(o) applies encompass everything a worker wears to be ready for work. The government, on the other hand, insists that "not everything worn on, or attached to, one's body qualifies as clothing" (U.S.Br. 23); specifically, the United States maintains that "equipment" and "devices" that are worn on the body are not clothes. Although in this case the government interprets its standard to warrant a decision in favor of respondent, in most section 203(o) cases the differences between the two proposed standards would be of substantial importance. We set out in the appendix a list of the section 203(o) cases which we have been able to identify; in many of them the disputed items are the same as or similar to the items cited in the government's brief as examples of "equipment" or "devices" that are not "clothes."

I. SAFETY AND OTHER EQUIPMENT OR DEVICES ARE NOT "CLOTHES" UNDER SECTION 203(o)

(1) US Steel contends that any item is "clothes" within the meaning of section 203(o) if it is part of "the work outfit that the employee will wear so as to be ready for work." (R.Br. 37). This proposed standard includes many things that an English speaker would not call "clothes."

Respondent insists that under its standard the respirators, safety goggles and ear plugs in this case are "clothes." (R.Br. 30, 38, 65). It points to a referee's whistle as another example fitting within its definition of "clothes." (R.Br. 39 n.14; see R.Br. 66 n.22 (space suits and metal armor). In the poultry processing industry, an employee's work outfit may include a knife scabbard. "[T]o be ready for work" a police officer must be wearing his or her gun, and the gear on the belt the officer wears often includes a radio, a baton, and a pair of handcuffs. These and many other items a person could wear are, in the government's terminology, "equipment" or "devices." In addition, to be "ready for work" members of the band Kiss must be wearing their unusual makeup, and Captain Kangaroo wore a wig. But English speakers do not refer to makeup or wigs as "clothes," just as they do not use that term to refer to respirators, earplugs, whistles, knife scabbards, guns, radios, batons, or handcuffs.

Respondent insists these things are all "clothes" because "clothes" means "any 'covering for the human body.'" (R.Br. 17, 26, 23, 41, 62, 65). But as the government correctly notes, there are many things which are worn on the body – and which thus necessarily *cover* part of the body – that are not referred to as clothes. "Welding helmets, respirators, and scuba tanks, for instance, are all worn on the body but are not commonly regarded as 'clothes.'" (U.S.Br. 23).

(2) The context of section 203(o) provides no support for construing "clothes" to include everything a worker wears to do his or her job.

Section 203(o) refers to changing clothes "at the beginning or end of the workday." Because the statute refers to clothes changing related to the "workday," US Steel contends that "clothes" must mean anything an employee wears to be able to "work[ ]." (R.Br. 27-28). But the fact that section 203(o) is about "clothes" changing related to work does not mean that the statute applies to putting on and taking off anything and everything related to an employee's job. Respondent insists that "[t]he statutory text ... draws no distinction between donning and doffing ... specific parts of a work outfit." (R.Br. 18). Of course it does; the text distinguishes between "clothes" – which are covered by section 203(o) – and everything else, which is not.

Respondent insists that "clothes" means "work outfit." Respondent then notes that one dictionary defines "outfit" to mean "wearing apparel *with accessories* designed to be worn on a special occasion or in a particular situation or setting." (R.Br. 28) (emphasis added). But the language actually used in section 203(o) is "clothes" not "outfit."

The fact that the term "clothes" occurs in the phrase "changing clothes" is evidence that "clothes" does not include everything an employee might wear for work. The expression "changing clothes" refers to substituting certain clothes for others. The items that typically would be involved in such a substitution

would be a shirt or blouse, pants or a skirt, or a dress or coveralls. But safety gear, as the government has noted (U.S.Br. 26 n.8), generally is put on over or in addition to a worker's clothes, rather than being substituted for street clothes. Respondent sets out in its brief a list of safety items that were used at mid-century; virtually everything on this list would have been put on over or added to an employee's work clothes.[1] The photographs of safety gear reproduced at pages 45-46 of respondent's brief all depict items that would have been worn over or in addition to a worker's clothes, not things that could have been substituted for a worker's street clothes.

(3) There are a number of reasons why Congress would have chosen to apply section 203(o) only to clothes – in the ordinary sense – but not to safety or other equipment or devices.

First, there is often a dispute about whether changing clothes (in the ordinary sense) is a principal activity; putting on employer-required equipment and devices, on the other hand, would always be a principal activity. Employees at times prefer for reasons of personal convenience to do their jobs in work clothes, rather than their street clothes; in that situation, changing clothes would not be a principal activity.

---

[1] Those items include goggles, safety hats, helmets, leggings, leather aprons, asbestos aprons, steel bradded aprons, hoods, gloves, spats, foot protectors, safety belts, mitts, masks, shields, and respirators. (R.Br. 29-30).

29 C.F.R. § 785.24(c). But when a worker puts on some equipment required by the employer or otherwise necessary to do the job – be it a poultry worker's knife scabbard, a police officer's gun, or a hard hat – that clearly would be a principal activity under the FLSA. Congress sensibly chose to apply section 203(o) only to cases – changing into and out of ordinary work clothes (and washing) – the compensability of which would frequently be at issue.

Second, in the era when section 203(o) was adopted, both collective bargaining agreements and decisions of the War Labor Board distinguished between changing clothes (in the ordinary sense) and putting on (and taking off) equipment and devices. Brief of the American Federation of Labor and Congress of Industrial Organizations, *et al.*, as *Amici Curiae*, 5-14.

Third, and most importantly, this distinction is necessary to prevent circumvention of the well-established rule that a worker engages in a principal activity when he or she carries tools or other needed materials to the location in a plant where work is to occur. The Department of Labor's 1947 policy guidance concluded that the preparatory act of bringing needed materials to work stations is a principal activity. 29 C.F.R. § 785.24(b)(2). Where an employee is required to carry tools to his or her work station from somewhere else in a plant, the period of time consumed is compensable under the FLSA. 29 C.F.R. § 785.38. In *Amos v. United States*, 13 Cl.Ct. 442 (Cl.Ct. 1987), corrections officers were required to

pick up their weapons at one portion of a prison before going to their posts; the court held that the guards were entitled to compensation for the period during which they were carrying their guns to their posts. The activity of transporting materials, tools or weapons in this manner within a plant, mine or prison is clearly outside the scope of section 203(o). That well-established principle applies as well to safety equipment or devices that a worker must have "to be ready for work." (R.Br. 37).

But that rule could be evaded if an employer could require a worker to *wear* the transported item, and then characterize the event as "changing clothes." In this case, for example, respondent suggests that a tool belt is "clothes" under section 203(o). (R.Br. 59). If that is correct, an employer could circumvent the law simply by directing a worker to "wear" a tool in a tool belt, rather than carrying it in his or her hand or pocket. And if wearing rather than holding a transported item is "changing clothes," an employee's right to compensation could vary depending on whether, for example, a guard put his or her gun in a holster, rather than holding it in his or her hand.

These problems of potential evasion and uneven application, on the other hand, are not posed by an employee changing into and out of regular work clothes – such as a shirt and pants. Unlike transporting tools or safety gear, a worker could not just carry his or her work pants and shirt to his or her work station, and then change there. Considerations of privacy would preclude a worker from disrobing in

the middle of the plant floor, and often there would be no place to store his or her street clothes.

(4) Respondent insists that at mid-century safety equipment and devices were widely worn by industrial employees, that Congress was well aware of that practice, and that the main purpose of section 203(o) must have been to apply to such equipment and devices. (R.Br. 19, 21, 34, 36, 44, 52). Even if such use of safety gear had been ubiquitous in industry and known to Congress, that would provide no support for respondent's contention that Congress intended "clothes" to cover equipment and devices. To the contrary, such use and knowledge would make Congress's choice of the narrower term "clothes" all the more deliberate.

Respondent's underlying premise is incorrect. At page 31 of its brief respondent asserts that "Congress enacted section 203(o) only two years after it had enacted the Portal to Portal Act.... As a result, Congress was familiar with the specialized and protective work outfits ... worn in heavy industries that gave rise to the portal to portal controversies in industries such as mining and manufacturing. *See supra* at 3-5." But respondent's summary of the background of the Portal-to-Portal Act notes only that in one of the cases which triggered that legislation the workers put on "aprons and overalls." (R.Br. 2) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 783 (1946)). Potters' overalls and aprons are not "specialized and protective work outfits."

Respondent also relies on certain "Minimum Standards" for protective clothing established by the Department of Labor. (R.Br. 29). These standards were issued in March, 1935, under the National Industrial Recovery Act (NIRA). But two months later this Court invalidated the NIRA. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The stillborn standards quoted by respondent would have had little if any impact on actual work conditions. The Department of Labor's paper "Practical Work Clothing for Women," which respondent also cites, is merely a set of suggestions, not a description of prevailing practice; in most instances the suggestions regarding protective gear refer to only a single plant that used one of the recommended items. The other recommendations in this 1941 publication included an end to wage discrimination on the basis of race or sex. United States Department of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics, Vol. 1, 523 (1941). The 1914 magazine article which respondent refers to as *Work Clothes* was actually entitled *Work Clothes for Special Jobs*.[2]

The government asserts that when section 203(o) was adopted, workers in steel mills wore protective clothing "not different in kind" from that used at US Steel today. (U.S.Br. 23). That is not correct. We set out in the appendix photographs of steel mills, including from Gary Works, taken in that earlier era.

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[2] J.T. Carpenter, *Working Clothes for Special Jobs*, Factory, The Magazine of Management 402 (January 1914).

The workers generally have nothing protective over their torsos, arms and legs; they are wearing ordinary clothes or work clothes such as overalls or coveralls, and some men are bare-chested. Hard hats were uncommon; workers most often wore cloth caps or (in the case of women) kerchiefs. The only recurring safety items were dark goggles and gloves; many workers wore neither, and neither would have to be donned before work actually began. In photographs in an advertisement published by the steel industry in *Life* magazine, the foreman demonstrating the use of machinery at a steel plant is wearing a tie, a vest, and a fedora. A similar pattern is evident in movies taken at steel mills during this era.[3]

(5) Interpreting section 203(o) to exclude safety equipment and devices worn on the person would not, as respondent suggests, render that provision meaningless. Section 203(o) would still apply, for example, to tens of thousands of bakeries, the specific and indeed only industry cited by the sponsor of what became that provision. (See p. 17, *infra*). In 1949 bakeries were probably the most common employers at which changing clothes would have been a principal activity under the FLSA. Section 203(o) would apply as well to workers like those in *Steiner v. Mitchell*, 350 U.S. 247 (1956), who replaced their street clothes with old work clothes that had no specialized or protective function, but were substituted for street clothes

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[3] See, e.g., the 1944 Movie about an Ohio Steel Plant at http://www.youtube.com/watch?v=hlqggGOZw.

because the corrosive chemicals at the plant involved quickly destroyed whatever was worn there.

II. THE UNITED STATES DOES NOT OFFER A CLEAR STANDARD DELINEATING WHAT CONSTITUTES EQUIPMENT OR DEVICES OUTSIDE THE SCOPE OF SECTION 203(o)

The government argues that in applying section 203(o) courts should distinguish between clothes and "equipment" or "devices." Utilizing these same categories, the AFL-CIO concludes that at least most of the items at issue in this case are equipment. Brief of the American Federation of Labor and Congress of Industrial Organizations, *et al.*, as *Amici Curiae*, 15. The government, on the other hand, insists that at least almost all of the items in this case are clothes rather than equipment.[4] It is unclear how the government arrives at that conclusion or what standard – defining "equipment" and "devices" – it is proposing.

In one passage the government suggests that the distinction between clothes and equipment or devices turns on weighing two factors, form and function. "Lower courts ... have indicated that some types of items worn on the body are so distinctive in form and function that they are properly classified as equipment rather than clothes." (U.S.Br. 25). Elsewhere the government suggests that neither "the function"

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[4] The government takes no position regarding the classification of ear plugs, goggles or hard hats.

of an item nor the "material out of which" it is made affect the applicability of section 203(o). (U.S.Br. 16). In yet a third passage, the government's brief states that "historical materials and modern case law indicate that some items of specialized equipment are so distinct in form and function" that they are not clothes within the meaning of section 203(o). (U.S.Br. 8). On this latter view certain equipment *is* "clothes": non-specialized equipment as well as some but not all specialized equipment. That standard might rule out classifying ear plugs or hard hats as equipment rather than clothes, because they may not be "specialized."

The government insists that virtually all of the items in this case are clothes rather than equipment, but it is unclear how the government arrived at that conclusion. After setting out the distinction between clothes and equipment, the government brief states without any elaboration that "as explained above, the items at issue here fall within the ordinary meaning of the term 'clothes.'" (U.S.Br. 26). But nowhere prior to this statement does the government explain why the disputed items would not be classified as equipment or devices. "Device" certainly seems to be the appropriate term, for example, to describe the contraption referred to as "leggings."

At page 10 of its brief the government asserts that some of the items in this case are "garments," but does not include the metatarsal boots in that grouping. At pages 10-11 it cites the court of appeals' statement that "any English speaker would say that

the model in our photo is wearing work clothes." But the court of appeals meant only that *some* of the items worn by the model would be described as clothes; it acknowledged the safety glasses and perhaps hard hat would not. And the model is not wearing either the leggings or the wristlets.

The Solicitor General twice notes that in the era when section 203(o) was adopted gloves were often characterized as equipment (U.S.Br. 25 and n.6), and yet insists that in this case gloves instead are clothes. (*Id.* at 10). The government cites with approval authorities which characterize "wrist guards" and "plexiglass armguards" as equipment (*id.* at 25), but asserts that Kevlar forearm coverings (wristlets) and ankle protectors (leggings) are clothes. (*Id.* at 10). "Metal guards" are apparently equipment (*id.* at 24), but the United States contends that the metatarsal boots in this case are clothes, even though those special boots are used precisely because they contain metal toe boxes, commonly referred to as "metal toe guards." (*Id.* at 10). A leather or chain link apron may be equipment (*id.* at 25 and n.6), but for some reason a Kevlar snood is not. (*Id.* at 10). The fact that an item is made of metal, chain link or perhaps leather may render it "equipment," but apparently the identical item made of Kevlar (which is stronger per ounce than metal, chain mail, or leather) would be clothes. The flame retardant jacket and pants – designed to protect against molten metal – could as fairly be described as "protective equipment for the[ ] arms, torsos, and legs" as the items used in

the meat industry to protect against knives and saws. (*Id.* at 25) (emphasis omitted).

III. CLOTHES WITHIN THE MEANING OF SECTION 203(o) DO NOT INCLUDE ITEMS USED TO PROTECT AGAINST A WORKPLACE HAZARD AND FASHIONED TO PROVIDE PROTECTION FROM HAZARDS

(1) In our opening brief we urged the Court to hold that the term "clothes" in section 203(o) "does not include items that both are worn to protect the user from workplace hazards and were designed for such a protective function." (Pet.Br. 57).

Respondent and the government object that excluding "protective" items from the scope of section 203(o) would be far too broad, because most clothes are intended to have some protective effect, such as protecting the wearer from the cold or the sun. (U.S.Br. 20; R.Br. 18, 21). But our brief could not have been more emphatic that our proposed standard refers only to protection from *workplace* hazards; we repeated that limitation consistently, and italicized it in the summary of argument.

The government argues that section 203(o) should not exclude an item merely because it was designed to have some special function, objecting that such a rule also would be unduly broad. But our proposed standard is limited to items with a single specific purpose – protection – and it also requires that the

item actually be used to protect the wearer from a workplace hazard.

In our opening brief we explained the impossibility of framing a single definition of clothes, noting that common usage is complex and inconsistent and turns on half a dozen different, sometimes ill-defined variables. (Pet.Br. 19-22). Referring to that portion of our brief, the government objects that this "array of factors does not provide reasonable certainty for employers and employees.... [P]etitioners do not explain how jurists could apply *their approach* with any consistency." (U.S.Br. 19) (emphasis added). But utilization of that array of factors was precisely the approach which we argued that the courts should *not* take.

(2) The United States in this case contends that section 203(o) is not subject to the general principle that statutory exemptions are to be narrowly construed. (U.S.Br. 28-29). In 1997 and 2010, the Department of Labor took the opposite position.[5] We agree with the government's earlier view.

The government argues that section 203(o) "does not function like a typical exclusion: it does not place

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[5] U.S. Dep't of Labor, Opinion Letter (Dec. 3, 1997), 1997 WL 998048 ("Since section 3(o) provides an exemption from the broad, remedial provisions of the FLSA, it must be read narrowly"); U.S. Dep't of Labor, Opinion Letter (FLSA 2010-2) (June 16, 2010), 2010 WL 2468195 ("§ 203(o) [is] an exemption that must be read narrowly").

changing clothes and washing-up time outside the Act as a categorical matter." (U.S.Br. 29). Unfortunately, that is as a practical matter precisely how section 203(o) often functions. The government assumes that under the FLSA (but for section 203(o)) workers have a clear right to compensation for clothes changing, and that employers know they may not escape their duty to pay that compensation without affirmative consent from the union. (U.S.Br. 18). In practice, however, whether an employer has to pay for clothes changing is often hotly disputed; in this very case, US Steel still insists that it need not do so (even if section 203(o) is inapplicable) because the time the clothes changing requires is *de minimis*. So, unlike provisions involving an indisputable right to compensation, an employer usually has little motivation to seek an express CBA provision permitting non-compensation; an employer would not give the union "something in return" for agreeing to non-compensation (U.S.Br. 18), because on the employer's view the union's agreement was not needed anyway.

In addition, application of section 203(o) is triggered by a "custom or practice" under a CBA. The lower courts have held that once an employer begins to require clothes-changing (or to require workers to wear any additional item) without compensation, the practice will become a custom or practice under the CBA within the meaning of section 203(o) unless the union can get the company to relent and provide compensation. The net effect of these factors has been that when an employer requires workers to wear

particular items, if the union fails to negotiate compensation for the work involved, the increased duties then become exempt from compensation as a de facto custom or practice.[6]

(3) The legislative history of section 203(o) is consistent with the standard we propose. The Portal-to-Portal Act of 1947 provided that employers were not required to compensate employees for "activities which are preliminary to or post-liminary to ... principal activity or activities." 29 U.S.C. § 254(a). The Department of Labor in 1947 issued an interpretative bulletin which concluded that principal activities included activities at the beginning and end of the work day that are integral and indispensable to its performance. See 12 Fed. Reg. 7655 (Nov. 18, 1947) (29 C.F.R. § 785.24(c)).

In 1949 House hearings, the Associated Retail Bakers of America objected to this interpretation of the Act. It maintained that the activities that are compensable under the FLSA should not include any work which is not compensable under prevailing industry custom or practice, or under a collective

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[6] *Hudson v. Butterball, LLC*, 2009 WL 3486780 at *3 (W.D.Mo. Oct. 14, 2009); *Burks v. Equity Group-Eufaula Division, LLC*, 571 F.Supp.2d 1235, 1245 (M.D.Ala. 2008); *In re Cargill Meat Solutions Wage and Hour Litigation*, 632 F.Supp.2d 368, 387 (M.D.Pa. 2008); *Gatewood v. Koch Foods of Mississippi*, 589 F.Supp.2d 687, 701 (S.D.Miss. 2008); *Anderson v. Pilgrim's Pride Corp.*, 147 F.Supp.2d 556, 564-65 (E.D.Tex. 2001); *Nardone v. General Motors, Inc.*, 207 F.Supp. 336, 349 (D.N.J. 1962).

bargaining agreement, regardless of the nature, importance or timing of that activity.[7] Neither the Bakers' statement nor the new statutory language that it proposed were directed at any particular type of employee activity.

The FLSA legislation reported by the House committee contained no provision related to this proposal. The House, however, adopted an amendment offered by Representative Herter which would have permitted compensable time to be limited by the terms of, or a custom and practice under, a collective bargaining agreement, but not merely by virtue of an industry custom. In explaining his amendment, Representative Herter referred to only a single specific example of the need for his proposal, bakeries.

> In the bakery industry, for instance, ... there are collective-bargaining agreements with various unions ... which define exactly what is to constitute a working day and what is not to constitute a working day. In some of those collective-bargaining agreements the time taken to change clothes and to take off clothes at the end of the day is considered a part of the working day. In other collective-bargaining agreements it is not so considered. But, in either case the matter has been carefully threshed out between the employer

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[7] *Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938: Hearings Before Subcomm. No. 4 of the H. Comm. on Education and Labor*, 80th Cong., 1st Sess. 1565-69 (1947).

> and the employee and apparently both are completely satisfied with respect to their bargain agreements.

95 Cong. Rec. 11210 (Aug. 10, 1949). The terms of the language adopted by the House, however, were not limited to any particular type of activity; under it a collective bargaining agreement could have excluded from compensable time all work hours over 40 a week, all work done before 8 a.m., or all bread kneading. *Id.*

The Senate bill contained no comparable provision limiting the activities compensable under the FLSA. The conference committee agreed on the language currently in section 203(o), which unlike the Herter amendment is narrowly limited to only two activities: changing clothes and washing.

Our proposed interpretation of section 203(o) is entirely consistent with this legislative history. As the Department of Labor has correctly observed, "[t]he 'clothes' that Congress had in mind in 1949 when it narrowed the scope of § 203(o) [were] those 'clothes' that workers in the bakery industry changed into and 'took off' in the 1940s." U.S. Dep't of Labor, Opinion Letter (FLSA 2010-2) (June 16, 2010), 2010 WL 2468195. In 1949, as today, the clothes bakers wore at work were ordinary cloth pants, shirts and aprons, often white; they were used to assure the cleanliness of the baked goods, not to protect the workers. And the workers (if they "changed clothes" at work) substituted those work clothes for their street clothes; that substitution, often required by state law, assured

that the food was not contaminated by dirt or germs on those street clothes.

In arguing for a broader interpretation of section 203(o), respondent relies primarily on a statement by the National Association of Manufacturers (NAM), which referred to a passage in the Department of Labor 1947 policy guidance that mentioned the use of "special clothing" by workers at a chemical plant. (R.Br. 7, 19, 35-36, 50). Respondent insists that the House decision to adopt the Herter amendment was a "response" to the NAM statement. (*Id.* at 7, 35). But this is not a plausible account of the reason for the decision of the House to adopt the Herter amendment. The NAM statement was merely a document, one of many, placed in the record of a *Senate* hearing.[8] In the ordinary course of congressional business, members of the House would have no reason to be aware of such a minor event at a Senate committee hearing. It is likely that the transcript of the April 1949 Senate hearings, including the written statement now quoted by respondent, was not printed until after the House acted in August of that year.

(4) In our opening brief we noted that in common usage a protective garment is ordinarily referred to as "protective clothing" not "protective clothes."

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[8] The passage on which respondent relies from the NAM statement consists of two sentences out of a 5,000 word document, the rest of which was devoted to other matters.

(Pet.Br. 48-50).[9] Respondent argues the distinction is meaningless, because a dictionary "define[s] 'clothes' to mean 'clothing.'" (R.Br. 47). But dictionaries are descriptive not prescriptive, an attempt to summarize how words are actually used. Where, as in this specific instance, two words demonstrably are used differently, it is irrelevant whether the authors of a dicdictionary concluded that in other situations (or even most of the time) those words can be used interchangeably.

Respondent suggests that the only reason Congress did not utilize the phrase "changing clothing" in section 203(o) is that it would have involved an awkward use of two neighboring words ending in "ing." (*Id.* and n.18). To illustrate the supposed literary convention of avoiding such usage, respondent notes that in federal cases in Westlaw "changing clothes" is used 274 times, far more than the 15 instances of "changing clothing." (*Id.*). But that has nothing to do with the suffix "ing"; the phrase "chang*ed* clothes" also appears far more often (420 times) than "chang*ed* clothing" (24 times).

Respondent asserts that reports and authorities in 1949 often used the term "clothes" to refer to protective items. But the only document which respondent cites for this claimed usage of the term "clothes"

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[9] There is a typographical error on p. 49 of that brief. The fourth line down should begin "protective clothes" not "work clothes."

is an article published 35 years earlier in a 1914 edition of a long defunct magazine. J.T. Carpenter, *Working Clothes for Special Jobs*, Factory, The Magazine of Management 402 (January 1914) (R.Br. 30). And the significance which respondent attaches to the title of this article is undermined by the fact that the article describes both protective and non-protective items.

(5) The government argues that

> [n]either Section 203(o)'s text nor its purpose suggests that its application should depend on the material out of which specialized clothing is made or the *function* such clothing serves (whether ... protection ... or something else).

(U.S.Br. 16) (emphasis added). This implies that whether an item worn by a worker has a protective function would be irrelevant to whether the item is clothes within the meaning of section 203(o).

But elsewhere the government apparently maintains that function does matter; it refers with evident approval to lower court decisions which "have indicated that some types of items worn on the body are so distinctive in *form* and *function* that they are properly classified as equipment rather than clothes." *Id.* at 25 (emphasis added). And in describing the facts of *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), as involving "a variety of *protective equipment*" (*id.*), the government's brief italicized the term "protective" for emphasis. It is these latter passages which indicate the correct approach. The Court should hold that an

item is not "clothes" within the meaning of section 203(o) if its function is to protect the wearer from a workplace hazard, and its form (including the materials from which it is made) was fashioned to provide protection from hazards.

IV. "CHANGING CLOTHES" REFERS TO SUBTITUTING CLOTHES FOR OTHER CLOTHES

The meaning of the transitive verb "to change" depends on the direct object of that verb. We set out in our opening brief quotations from fifteen dictionaries; in every one of them the verb "change" refers to substitution when the direct object is "clothes." (Pet.Br. 24-25 and nn.17-18). Neither US Steel nor the government dispute our characterization of the definitions in those dictionaries, and neither has been able to identify a single dictionary that defines change, in this specific context, in any other way.

The government, however, asserts that the "ordinary" meaning of "change" is to "make different." (U.S.Br. 31). Similarly, US Steel argues that the "primary" or "ordinary" definition of "change" is "to render different, alter." (R.Br. 55). But that is merely to observe that when the verb "change" has a different direct object (as in "change a law"), it may have a different meaning. The meaning of "change" in any particular instance turns on the particular direct object with which it is being used, not on its meaning in other circumstances, however common they may be.

The government acknowledges that when the verb "change" is used with the direct object "diaper" or "tire," it refers to substitution. The government also concedes that "changing clothes" "typically implies removal of one outfit and substitution of another." (U.S.Br. 32). But it insists that "changing clothes" also has a second, widespread meaning. According to the United States, in ordinary usage "changing clothes" "commonly refers ... to placing new clothes on top of one's existing outfit." (U.S.Br. 32). The government, however, points to no actual example of that asserted usage. On the government's view, a person who puts on a scarf or a tie would be said to be "changing clothes"; that is not how the phrase is really used. Similarly, the government maintains that taking off an item of clothing is "changing clothes" (U.S.Br. 31) and that socks are clothes. (U.S.Br. 19). If that is correct, a person who takes off (and later puts back on) his or her socks to wade in the Reflecting Pool (or some other body of water) is "changing clothes." That is not how this common summertime activity is described.

The government argues that "change" could mean "alter" in the statement "one's set of clothes has changed." (U.S.Br. 32). The Solicitor General illustrates this hypothetical usage by observing that when a member of this Court put on a robe before taking the bench, the Justice's "set of clothes has changed." (*Id.*). But in this hypothesized sentence "set of clothes" has replaced "clothes," and it is the subject of the sentence, not the direct object. That sentence

reveals nothing about the meaning of the verb "change" when the direct object is diaper, tire or clothes. For example, if a parent put a cute sticker on a baby's diaper, it would be appropriate to say "the diaper has changed," but the parent who did so would not – except in jest – say that he or she had "changed the baby's diaper." Similarly, no one would describe the events that occur before and after oral argument as "the Justices changing clothes together in the robing room."

Respondent objects that, if "change" referred to substitution, section 203(o) would apply unpredictably in a case in which neither the employer nor the practicalities of the situation compel employees to disrobe before putting on required items; some workers might substitute work gear for street clothes while others do not. But that problem arises precisely because respondent seeks to expand "clothes" beyond its appropriate meaning. Traditional clothes – the white garments worn by bakers, the substitute clothes in *Steiner*, or a police officer's uniform – are invariably, and necessarily, substituted for street clothes. Respondent is compelled to insist on an implausible definition of "changing" because it wants to use an unduly expansive definition of "clothes." Or, in respondent's proposed terminology, because respondent wants to replace the actual statutory term "clothes" with "complete work outfit," it is required to insist on replacing the statutory term "changing"

with "donning and doffing." Neither departure from the actual language of the statute is appropriate.

The meaning of "changing" in section 203(o) is squarely within the scope of the question presented, "what constitutes 'changing clothes' within the meaning of section 203(o)." (Pet.Br. i). Both the petition and the petition reply brief[10] argued that the court of appeals had erred in concluding that section 203(o) applies to putting items on over and in addition to a worker's clothes. Petitioners clearly raised and briefed this argument in the court below,[11] and the court of appeals necessarily rejected it in directing dismissal of the complaint. Respondent argues, as do we, that the meaning of the term "changing" in section 203(o) sheds light on the proper interpretation of the word "clothes" in that provision.

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[10] Pet. 24; Pet. Rep. 12-13.

[11] Amended Response of Plaintiff-Appellees/Opening Brief of Cross-Appellants, 34-36; Reply Brief for Cross-Appellant, 23-25.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

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Items Held To Be "Clothes" Under Section 203(o)

Allen v. McWane, Inc., 593 F.3d 449, 451 (5th Cir. 2010) (safety glasses, ear plugs, hard hat, steel toe boots)

Anderson v. Cagle's, Inc., 2005 WL 3873160 at *5 (M.D.Ga. Dec. 8, 2005), *aff'd*, 488 F.3d 945 (11th Cir. 2007) (ear protection, hairnet, beard net, smock, non-slip shoes)

Anderson v. Pilgrim's Pride Corp., 147 F.Supp.2d 556, 561 (E.D.Tex. 2001) (ear plugs, safety glasses, hair-net, rubber boots, rubber gloves, smock, apron, kevlar or mesh gloves, plastic sleeves, dust mask)

Andrako v. United States Steel Corp., 632 F.Supp.2d 398, 410 (W.D.Pa. 2009) (safety glasses, hard hat, boots, flame retardant jacket and pants, snood, hood)

Arnold v. Schreiber Foods, Inc., 690 F.Supp.2d 672, 674-75 (M.D.Tenn. 2010) (safety glasses, ear plugs, steel toe safety boots, hard hat, bump cap, hairnet, beard net)

Atkinson v. House of Raeford Farms, Inc., 2011 WL 1526605 at *3 (Apr. 20, 2011) (ear plugs, safety glasses, safety gloves, arm guards, steel toe boots, apron, rubber gloves, hairnet, rubber sleeves)

Bejil v. Ethicon, Inc., 269 F.3d 477, 479 (5th Cir. 2001) (beard cover, shoe covers, lab coat, hair cover)

Burks v. Equity Group-Eufaula Division, LLC, 571 F.Supp.2d 1235, 1240 (M.D.Ala. 2008) (ear plugs, arm guards, steel mesh gloves, boots, smock, hairnet, beard net)

Castaneda v. JBS USA, LLC, 2011 WL 3294032 at *1 (Aug. 1, 2011) (ear plugs, safety glasses, hard hat, hairnet, scabbard, safety boots, arm guards, arm mesh, mesh apron, back mesh, mesh gloves, gaiters, weight belt, rubber apron, rubber gloves)

Curry v. Kraft Foods Global, Inc., 2012 WL 104626 at *1 (Jan. 12, 2012) (ear plugs, safety glasses, shoes, hairnet, beard net, shirt, work pants, bump cap)

Davis v. Charoen Pokphand (US), Inc., 302 F.Supp.2d 1314, 1317-19 (M.D.Ala. 2004) (ear plugs, hairnet, hat, smock, apron, rubber gloves, protective gloves, arm guards, boots, hard hat, cutting gloves, plastic sleeves)

Figas v. Horsehead Corp., 2008 WL 4170043 at *1 (W.D.Pa. Sept. 3, 2008) (hard hat, work shoes, flame retardant jacket, pants, coveralls)

Fox v. Tyson Foods, Inc., 2007 WL 6477624 (N.D.Ala. Aug. 31, 2007), 2002 WL 32987224 at *3 and n.3 (N.D.Ala. Feb. 4, 2002) (safety glasses, ear plugs, mesh or chain gloves, plastic sleeve guards, dust mask, hard plastic arm guards, hairnet, beard net, rubber outer gloves, safety shoes, boots)

Franklin v. Kellogg Co., 619 F.3d 604, 608 (6th Cir. 2010) (safety glasses, ear plugs, non-slip shoes, hairnet, beard net, bump cap)

Gatewood v. Koch Foods of Mississippi, LLC, 569 F.Supp.2d 687, 689-90 (S.D.Miss. 2008) (eye protection, plastic apron, rubber shoe covers, rubber or latex gloves, mesh gloves, plexiglass sleeves)

Guinan v. Boehringer Ingelheim Vetmedica, Inc., 803 F.Supp.2d 984, 988 (N.D.Iowa 2011) (safety glasses with side shields, face shield, safety goggles, hairnet,

beard net, scrubs or uniforms, coveralls, booties, steel toe boots)

Hudson v. Butterball, LLC, 2009 WL 3486780 at *1 n.2 (Oct. 14, 2009) (ear plugs, safety glasses, smock, bump cap, hairnet, coveralls, boots, mesh vest, plastic sleeves, apron, rubber gloves, mesh gloves, Kevlar gloves, mesh apron, arm guards, belly guard, scabbard, plastic gloves, knife holder)

Israel v. Raeford Farms of Louisiana, LLC, 784 F.Supp.2d 653, 656 (W.D.La. 2011) (ear plugs, plastic sleeves, apron, smock, hairnet, beard net, cutting glove)

Johnson v. Koch Foods, Inc., 670 F.Supp.2d 657, 660 (E.D.Tenn. 2009) (ear plugs, safety glasses, smock, hairnet, beard net, rubber boots, hard hat, bump cap, Kevlar gloves, mesh gloves, arm guards, plastic apron, plastic sleeves)

Kassa v. Kerry, Inc., 487 F.Supp.2d 1063, 1066 (D.Minn. 2007) (safety glasses, hairnet, beard net, shirt, pants, smock)

Marshall v. Amsted Rail Co., 817 F.Supp.2d 1066, 1069, 1074 (S.D.Ill. 2011) (goggles, ear plugs, fire retardant plants or jacket, protective sleeves, hood, helmet with shield, respirator, gloves, metatarsal boots, apron, face shield, thermal gloves)

McDonald v. Kellogg Co., 740 F.Supp.2d 1220, 1227 (D.Kan. 2010) (safety glasses, bump cap, shirt, smock, jacket, pants, work shoes)

Mitchell v. JCG Industries, 2013 WL 887985 at *1 (March 8, 2013) (ear plugs, plastic sleeves, guards, hairnet, lab jacket, plastic apron, cut resistant gloves)

Salazar v. Butterball, LLC, 644 F.3d 1130, 1134 (10th Cir. 2011) (ear plugs, safety glasses, mesh gloves, knife holders, arm guards, frock, apron, plastic sleeves, gloves, cotton glove liners, boots, hard hats)

Saunders v. John Morrell & Co., 1991 WL 529542 at *1 (Dec. 24, 1991) (goggles, steel mesh gloves, helmet, arm guards, belly guard, knife and cut resistant gloves, knife guard, steel toe shoes, rubber boots, rubber gloves, rubber apron, steel mesh apron)

Sepulveda v. Allen Family Foods, Inc., 591 F.3d 209, 212 (4th Cir. 2009) (safety glasses, ear plugs, bump cap, steel toe shoes, sleeves, arm shields, USDA required smock, USDA required plastic apron, USDA required rubber gloves, hairnet)

Sisk v. Sara Lee Corp., 590 F.Supp.2d 1001, 1003 (W.D.Tenn. 2008) (ear plugs, hard hat, belly guard, arm guards, scabbards/knife pouches, cut resistant gloves, rubber gloves, white coats, rubber steel toe boots, hairnet, beard net, cut resistant sleeves)

In re Tyson Foods, Inc., 694 F.Supp.2d 1358, 1362 (M.D.Ga. 2010) (ear plugs, plastic sleeves, hand and wrist protection, boots, smock, hairnet, beard net, gloves)

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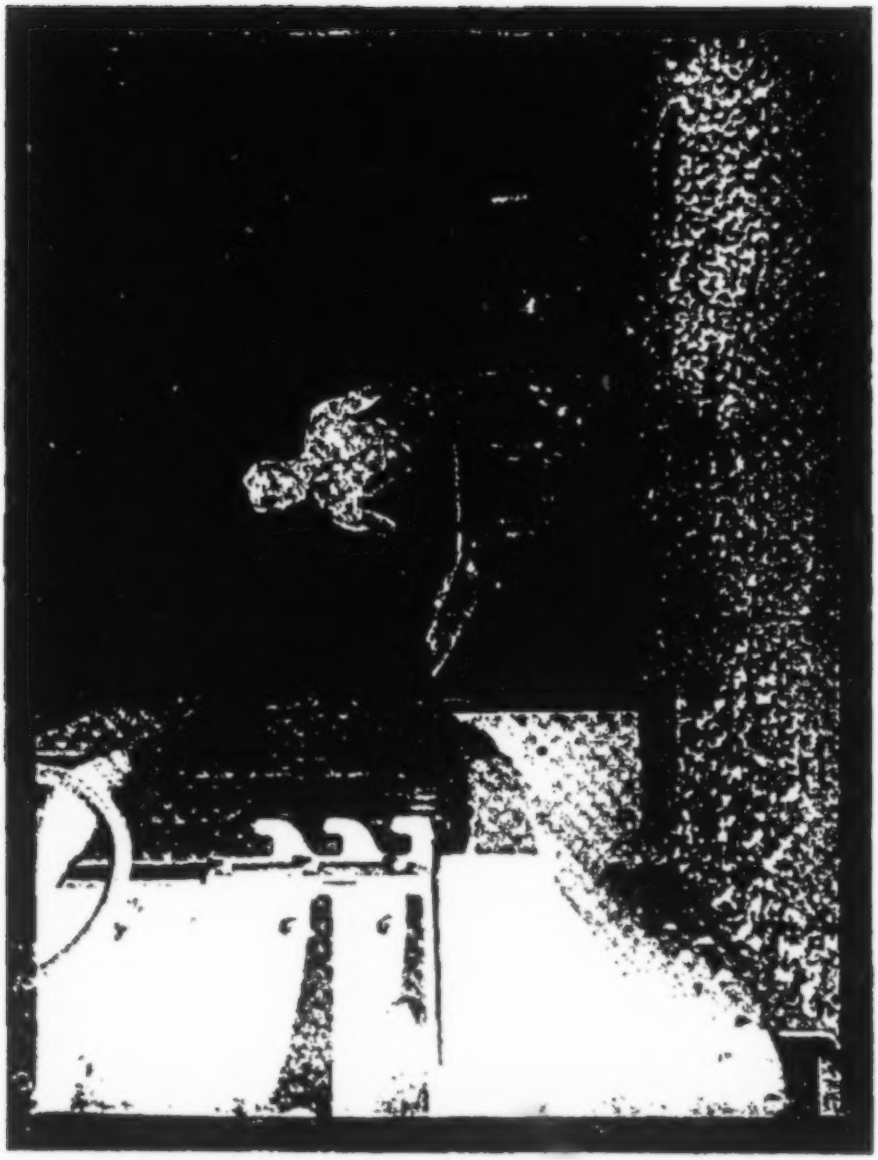

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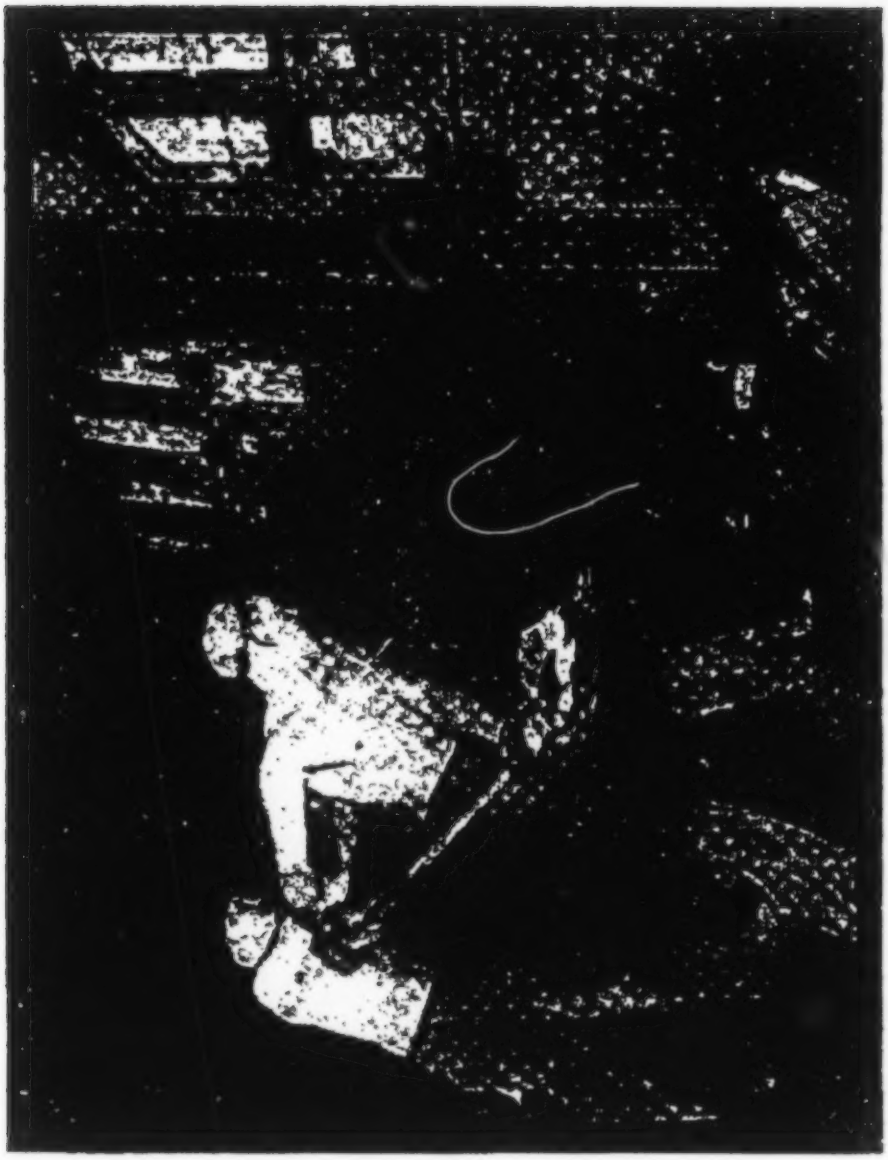

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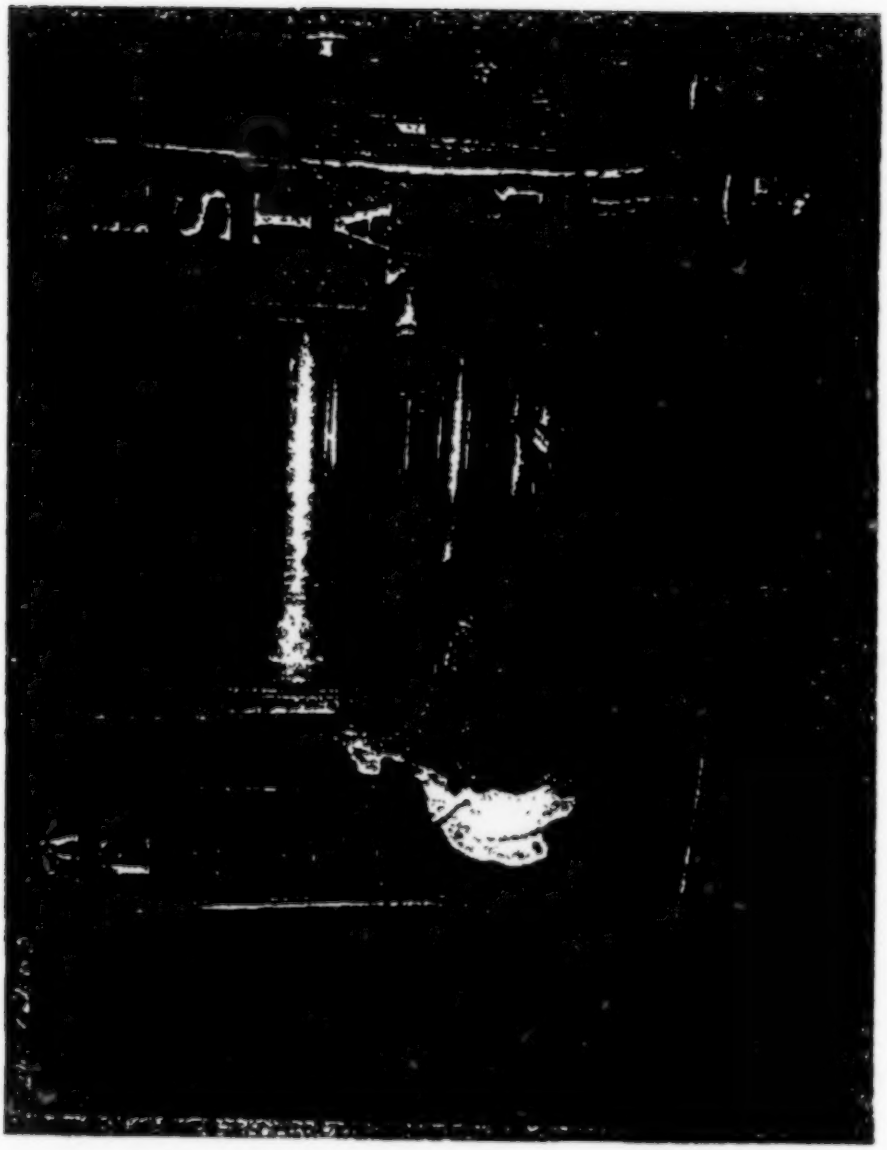

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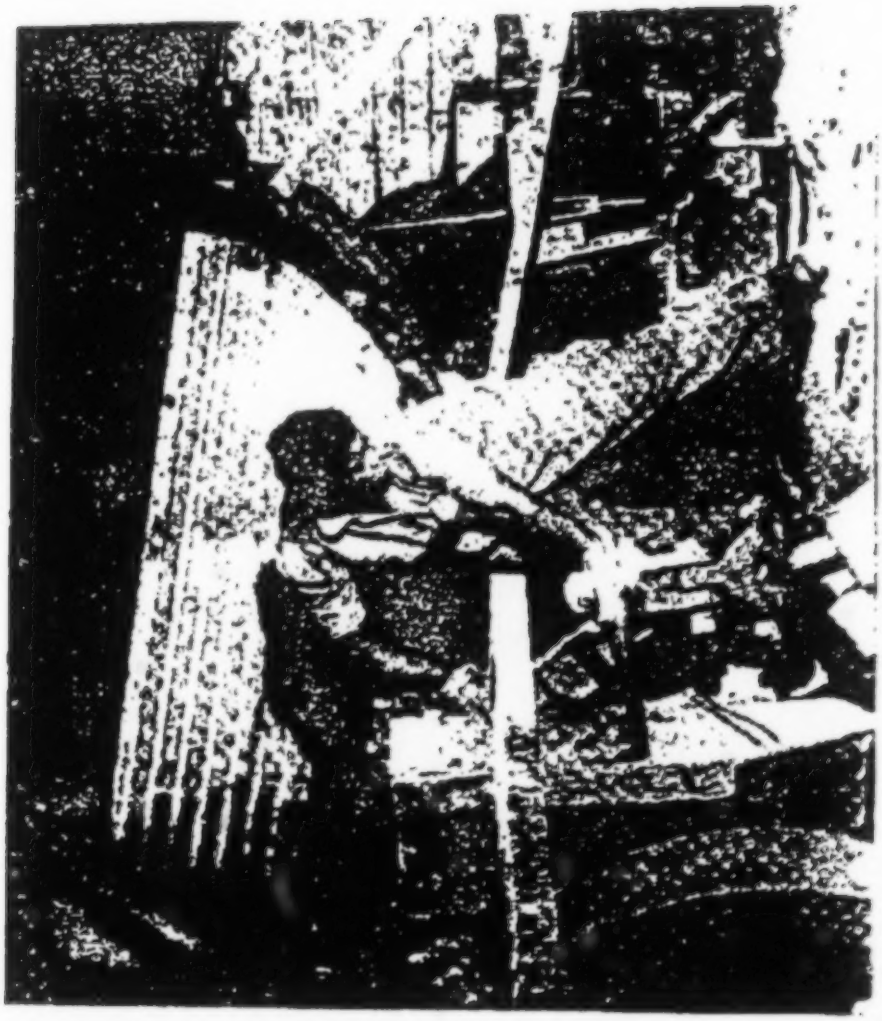

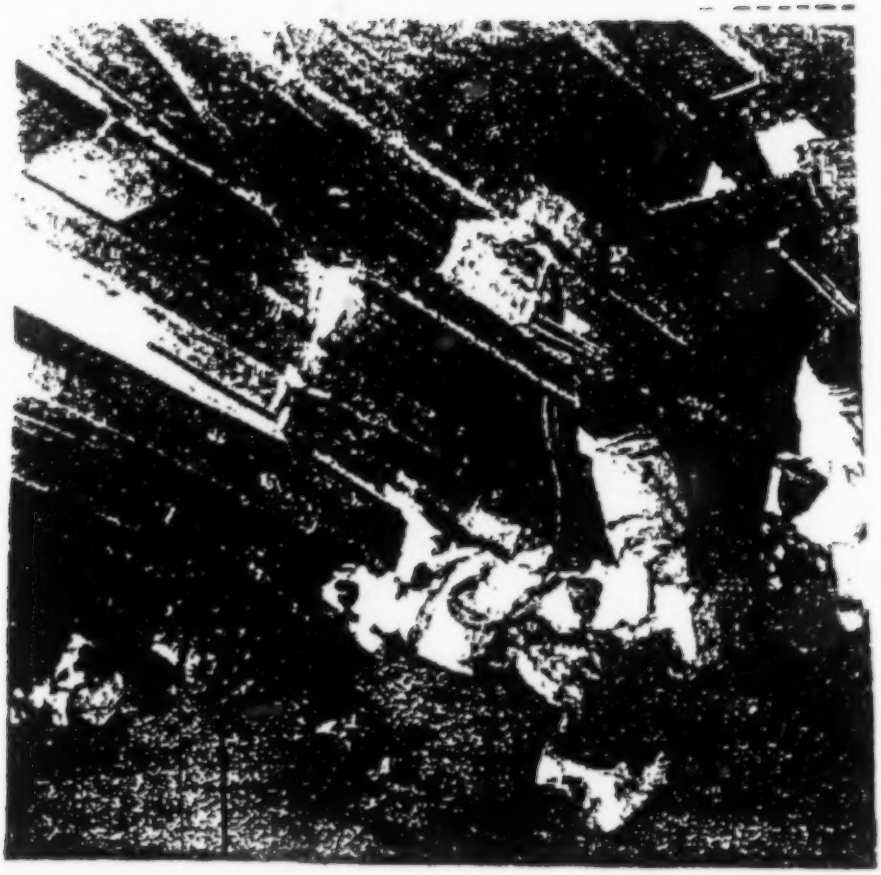

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-417

In the Supreme Court of the United States

CLIFTON SANDIFER, ET AL., PETITIONERS

v.

UNITED STATES STEEL CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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INTEREST OF THE UNITED STATES

This case presents the question whether petitioners, who don and doff flame-retardant garments and other items at the beginning and end of the workday in a steel manufacturing plant, are "changing clothes" within the meaning of the Fair Labor Standards Act of 1938 (FLSA or Act), 29 U.S.C. 203(*o*). The United States has a significant interest in the resolution of that question. The Secretary of Labor is responsible for administering and enforcing the FLSA's minimum wage and overtime pay provisions. See 29 U.S.C. 204(a) and (b), 216(c), 217. The operation of those provisions depends on calculating employees' working time. The treatment of time spent donning and doffing work-related garments and other items is therefore important to the proper enforcement

of the FLSA's minimum wage and overtime pay requirements.

STATEMENT

1. In 1938, Congress enacted the FLSA to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. 202(a). To address substandard working conditions, Congress required employers covered by the Act to pay their employees a minimum wage for all hours worked. 29 U.S.C. 206 (2006 & Supp. V 2011). The FLSA also requires covered employers to pay their employees at a rate of one and one-half times their regular rate of pay for time worked in excess of 40 hours in a workweek. 29 U.S.C. 207 (2006 & Supp. V 2011). Those minimum wage and overtime pay requirements thus require employers to determine the hours worked by their employees.

The FLSA provides that, in making that determination,

> there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

29 U.S.C. 203(*o*). The question in this case is whether steelworkers who don and doff specialized flame-retardant garments and other items at the beginning and end of the workday are "changing clothes" within the meaning of Section 203(*o*). If they are, then the time spent donning and doffing may be "excluded from meas-

ured working time * * * by the express terms of or by custom or practice under a bona fide collective-bargaining agreement." *Ibid.*

2. Petitioners are former and current nonmanagerial employees at a steel manufacturing plant in Gary, Indiana, operated by respondent United States Steel Corporation. Because of the dangerous environment in which they work, employees like petitioners wear specialized items to protect themselves from serious injury. Although the items worn by any particular employee depend on his or her job, employees commonly wear jackets, pants, and hoods (called snoods) manufactured from flame-retardant fabric. See Pet. App. 4a, 37a. Employees also commonly wear gloves, wristlets and leggings made of Kevlar fabric, metatarsal boots (usually containing steel to protect the toes and instep), safety glasses, ear plugs, and hard hats. See Pet. Br. 7-8. In addition, certain employees who work in particularly hazardous areas of the plant may wear other items like respirators or welding helmets. See *id.* at 6 n.5, 7.

All of those items are provided by respondent and may not be removed from the plant. See Pet. App. 36a-38a. As a result, employees arriving for work typically proceed to locker rooms where they don all or most of their protective attire (at least jackets, pants, hoods, wristlets, leggings, and boots). See *id.* at 37a; Pet. Br. 8-9. Employees then walk or ride to their assigned stations, and they may don remaining items (like gloves, safety glasses, ear plugs, and hard hats) while en route or before beginning their paid shifts. See Pet. App. 37a; Pet. Br. 9 & n.8. Less common items like respirators are generally stored and donned at employees' work sites. See Pet. App. 37a-38a. Employees' paid shifts begin and end when they arrive at and depart from their

assigned stations. See *id.* at 38a. At the end of their shifts, employees return to the locker rooms and take off their protective attire. Some employees shower before leaving the plant. See *id.* at 37a & n.2.

3. Since 1937, nonmanagerial employees like petitioners at the Gary plant have been represented by the United Steelworkers of America (USW).[1] Throughout that period, respondent and USW have negotiated national collective bargaining agreements that define the terms and conditions of employment. Beginning in 1947, and continuing through the five-year collective bargaining agreement in 2003, each of those agreements provided that respondent was not obligated "to compensate for any travel or walking time or time spent in preparatory and closing activities on the employer's premises * * * for which compensation is not paid under present practices." Resp. C.A. Br. A57; Pet. Br. 11. From 1947 to the present, respondent has not compensated employees for time spent doffing and donning protective items. See Pet. App. 52a, 59a.

In 2007, petitioners brought claims individually and as part of a collective action under 29 U.S.C. 216(b), alleging as relevant here that they were entitled to compensation for past time spent donning and doffing protective items. See Pet. App. 34a-35a, 37a-38a. Respondent moved for summary judgment on the ground that such claims were barred by 29 U.S.C. 203(*o*). Respondent argued that when employees donned and doffed protective attire and related items at the beginning and end of each workday, they were "changing clothes" for pur-

[1] Nonmanagerial employees at the Gary plant are members of one of two local unions (Local 1014 or 1066), depending on whether they are involved in the plant's steel production or steel finishing operations. See Pet. App. 35a-36a.

poses of Section 203(*o*). See Pet. App. 43a-45a. According to respondent, that donning and doffing time was not compensable under either the "express terms" of or the "custom or practice" under the governing collective bargaining agreement. 29 U.S.C. 203(*o*); see Pet. App. 52a-54a.

As part of the most recent five-year collective bargaining agreement in 2008, respondent and USW stated that

> starting in 1947, every national collective bargaining agreement [has provided that respondent] is not obligated to pay Employees for preparatory or closing activities * * * . Such activities include such things as donning and doffing of protective clothing (including such items as flame-retardant jacket and pants, metatarsal boots, hard hat, safety glasses, ear plugs, and a snood or hood), and washing up.

Resp. C.A. Br. A59. The parties modified their previous agreement in one respect: certain employees in the coke plant were to be compensated for 20 minutes of washing time. See *ibid.* The parties stated, however, that their "long-standing agreement" making "portal-to-portal activities non-compensable shall otherwise remain in effect." *Ibid.*

4. The district court granted respondent's motion for summary judgment in relevant part. See Pet. App. 34a-81a. The court reasoned that the term "clothes" in Section 203(*o*) "should be given its ordinary, contemporary, common meaning, that is, as 'covering for the human body or garments in general.'" *Id.* at 48a (quoting *Webster's Third New International Dictionary* 428 (1986)). After reviewing the items donned and doffed by petitioners, the court concluded that "the cloth jacket and pants, fabric snoods, hoods, leggings, and wristlets, and

boots here at issue easily fall within the ordinary definition of 'clothes.'" *Id.* at 49a. The court also rejected petitioners' argument that they were "changing" only if they substituted their work clothes for their street clothes. See *id.* at 50a. The court explained that placing work clothes on top of street clothes also constitutes "changing" because it modifies or alters what employees are wearing. *Id.* at 50a-51a. Finally, the court agreed with respondent that, under both the terms of the collective bargaining agreement and the parties' custom or practice, time spent changing clothes was not compensable. See *id.* at 52a-60a.[2]

5. The court of appeals affirmed in relevant part. See Pet. App. 1a-20a.[3] Reviewing the entire outfit worn

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[2] The district court further held that, although the time spent donning and doffing was not itself compensable, petitioners might be entitled to compensation for travel time between locker rooms and their work sites because the act of changing clothes could be a "principal activity" that began and ended the workday under 29 U.S.C. 254(a). See Pet. App. 64a, 68a. The district court certified its order for interlocutory review under 28 U.S.C. 1292(b). See Pet. App. 21a-33a. The court of appeals permitted the appeal, see *id.* at 20a, and the government filed an amicus brief arguing that the act of changing clothes could be a principal activity that starts the continuous workday. The court of appeals disagreed and reversed the district court's travel-time holding. See *ibid.* Although petitioners sought review of the travel-time question, they correctly note that this Court granted review only on the donning-and-doffing-time question. See Pet. Br. 3 n.1. This case therefore does not present the question whether an activity that is not compensable under Section 203(*o*) may nonetheless begin and end the workday.

[3] In granting interlocutory review under 28 U.S.C. 1292(b), the court of appeals accepted jurisdiction of the district court's summary judgment order, which had addressed the compensability of both travel time and donning and doffing time. See, *e.g.*, *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 205 (1996) ("[A]ppellate juris-

by a typical employee, the court observed that "[safety] glasses and ear plugs are not clothing in the ordinary sense but the hard hat might be regarded as an article of clothing." *Id.* at 6a (emphasis omitted). In the court's view, however, donning and doffing those items "is a matter of seconds and hence not compensable, because *de minimis*." *Ibid.* The court concluded that the rest of an employee's outfit—jacket, pants, snood, gloves, and boots—"certainly seems to be clothing." *Ibid.* (emphasis omitted). The court reasoned that "[i]t would be absurd to exclude all work clothes that have a protective function from [S]ection 203(*o*)," because "[p]rotection * * * is a common function of clothing, and an especially common function of work clothes worn by factory workers." *Ibid.*

SUMMARY OF ARGUMENT

A. The term "clothes" in 29 U.S.C. 203(*o*) covers the flame-retardant items worn by petitioners. That term commonly refers to garments or apparel worn to cover the human body, which includes at least the hoods, jackets, gloves, wristlets, pants, leggings, and boots worn by petitioners. The history underlying Section 203(*o*)'s enactment confirms that the term "clothes" refers to articles of dress that employees are required to wear (by law, workplace rule, or the nature of the work) in order to perform their jobs. That interpretation achieves the purpose of Section 203(*o*) by allowing negotiation over

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diction [under Section 1292(b)] applies to the order certified to the court of appeals, and * * * the appellate court may address any issue fairly included within the certified order.") (emphasis omitted). Respondent therefore correctly has not contested either the court of appeals' or this Court's jurisdiction to decide the donning-and-doffing-time question.

changing time in industries that require job-specific clothing.

B. Petitioners' various counterarguments lack merit. Setting aside that petitioners lack a clear test for determining whether items worn by workers are "clothes," they argue that items worn to protect employees against workplace hazards cannot be "clothes." But protection is a common function of clothing, especially work clothing. Petitioners' approach thus would exclude the types of work clothing worn in many professions that should lie at the core of Section 203(*o*). Although historical materials and modern case law indicate that some items of specialized equipment are so distinct in form and function that their donning and doffing does not constitute "changing clothes" under Section 203(*o*), that distinction does not aid petitioners because the items at issue here are clothes rather than equipment. Contrary to petitioners' other arguments, Section 203(*o*) is not an exemption that must be narrowly construed, and OSHA regulations do not indicate that the items worn by petitioners fail to qualify as "clothes."

C. Petitioners err in contending that they are "changing" into their work clothes only if they first remove their street clothes. The court of appeals did not consider that argument, and petitioners did not present the argument to this Court at the certiorari stage as a basis for reversing the judgment below. In any event, the ordinary meaning of the verb "change" in this context encompasses donning work clothes over street clothes, because the employee has made his attire different by modifying it. Petitioners' contrary interpretation would mean that employees drift in and out of FLSA coverage depending on the season and even the day, or whether employees change clothes in a single

place or in multiple places. The courts of appeals to consider the question have uniformly concluded that there is no logic to such a haphazard approach.

ARGUMENT

A. Petitioners' Donning And Doffing Of Flame-Retardant Garments Constitutes "Changing Clothes" Under Section 203(*o*)

The FLSA requires covered employers to pay their employees a minimum wage for all hours worked, 29 U.S.C. 206 (2006 & Supp. V 2011), as well as overtime pay for time worked in excess of 40 hours in a workweek, 29 U.S.C. 207 (2006 & Supp. V 2011). In determining the hours worked by an employee, Section 203(*o*) of the Act provides that

> there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

Section 203(*o*) of the FLSA thus provides that time spent "changing clothes" may be excluded from an employee's compensable working time by a collective bargaining agreement. The court of appeals correctly held that petitioners' donning and doffing of specialized flame-retardant garments at the beginning and end of their workday constitutes "changing clothes" under Section 203(*o*).

1. The ordinary meaning of the term "clothes" covers petitioners' work garments

Dictionaries commonly define "clothes" or "clothing" as "covering for the human body or garments in general." *Webster's Third New International Dictionary* 428 (1993) (*Webster's Third*); see *The American Heritage Dictionary of the English Language* 350 (4th ed. 2006) (defining "clothes" as "[a]rticles of dress; wearing apparel; garments"); *The New Oxford American Dictionary* 322 (2d ed. 2005) (defining "clothes" as "items worn to cover the body") (*New Oxford*); *The Random House Dictionary of the English Language* 390 (2d ed. 1987) (defining "clothes" as "garments for the body; articles of dress; wearing apparel") (*Random House*). The ordinary meaning of the term "clothes" was the same in 1949 when Section 203(*o*) was enacted. See, *e.g.*, *Funk & Wagnall's New Standard Dictionary of the English Language* 505 (1946) (defining "clothes" as "[t]he various articles of raiment worn by human beings; garments collectively").

Applying that definition here, each petitioner wears a flame-retardant hood, jacket, gloves, wristlets, pants, and leggings to cover his head and neck, torso, and upper and lower limbs. See Pet. App. 37a. Those items are "covering for the human body or garments in general." *Webster's Third* 428. They constitute a steelworker's "articles of dress" or "wearing apparel." *Random House* 390. As the court of appeals explained, an ordinary English speaker would say that steelworkers in the Gary plant are wearing clothes, albeit a particular type of clothes designed to protect them from the unique dangers of their work environment. See Pet. App. 7a ("Almost any English speaker would say that the model in our photo is wearing work clothes."). Many occupa-

tions require apparel suited to a particular environment, and those specialized garments are different types of clothing.

Accordingly, five of the other six courts of appeals to consider the question (the Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits) have held that the ordinary meaning of the term "clothes" extends to various types of industry-specific apparel. See, *e.g.*, *Salazar* v. *Butterball, LLC*, 644 F.3d 1130, 1139 (10th Cir. 2011) (poultry processing plant); *Franklin* v. *Kellogg Co.*, 619 F.3d 604, 614-616 (6th Cir. 2010) (food processing plant); *Sepulveda* v. *Allen Family Foods, Inc.*, 591 F.3d 209, 214-216 (4th Cir. 2009) (poultry processing plant), cert. denied, 131 S. Ct. 187 (2010); *Anderson* v. *Cagle's, Inc.*, 488 F.3d 945, 955-956 (11th Cir. 2007) (poultry processing plant), cert. denied, 553 U.S. 1093 (2008); *Bejil* v. *Ethicon, Inc.*, 269 F.3d 477, 480 n.3 (5th Cir. 2001) (per curiam) (surgical product manufacturing plant). Only the Ninth Circuit has held that "materials worn by an individual to provide a barrier against exposure to workplace hazards" are not "clothes" for purposes of Section 203(*o*). *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 905 (2003), aff'd on other grounds, 546 U.S. 21 (2005). As explained below, see Part B, *infra*, the Ninth Circuit's approach did not rest on Section 203(*o*)'s text, which extends to garments worn by workers in particular industries to safeguard them from workplace hazards.[4]

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[4] Petitioners wear a few other items—safety glasses, ear plugs, and hard hats—that, in the court of appeals' view, are not clearly "clothes" for purposes of Section 203(*o*). See Pet. App. 6a ("The glasses and ear plugs are not clothing in the ordinary sense but the hard hat might be regarded as an article of clothing.") (emphasis omitted). Those items are not at issue before this Court. The district court found that the time spent putting on and taking off those items

2. The ordinary meaning of the term "clothes" is confirmed by the history underlying Section 203(o)'s enactment

In 1946, this Court held that "the statutory workweek" for FLSA purposes includes "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-691 (1946). The Court therefore concluded that time spent "in walking to work on the employer's premises * * * must be included in the statutory workweek and compensated accordingly, regardless of contrary custom or contract." *Id.* at 691-692. The Court reached the same conclusion with respect to time spent by employees "pursu[ing] certain preliminary activities after arriving at their places of work, such as putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools." *Id.* at 692-693.

Congress concluded that this Court's decision in *Anderson* disregarded "long-established customs, practices, and contracts between employers and employees,

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is *de minimis* and therefore not compensable for that independent reason. See *id.* at 49a ("[E]ven if the court were to assume that hard hats, safety glasses, and ear plugs aren't 'clothes,' the time expended by each employee donning and doffing those items is minimal, or de minimis, and thus not compensable under the FLSA.") (internal citation omitted). The court of appeals agreed with that determination. See *id.* at 6a. Petitioners did not challenge that determination at the certiorari stage, nor do they challenge it in their opening brief. This Court therefore does not need to resolve whether putting on or taking off safety glasses, ear plugs, and hard hats is included within "changing clothes" for purposes of Section 203(*o*).

thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C. 251(a). To address that situation, Congress enacted the Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84 (29 U.S.C. 251 *et seq.*), which provides that time spent by employees on two types of activities is not compensable under the FLSA:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. 254(a). Under Section 254(a), an employee's compensable workday for FLSA purposes begins when he commences his first principal activity and ends when he finishes his last principal activity. See *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 28-29 (2005); 29 C.F.R. 790.6(a) and (b).

Section 254(a) does not address, however, whether time spent changing clothes must be "preliminary" and "postliminary" to an employee's principal activity or in some circumstances can be part of engaging in that principal activity. The Department of Labor took the latter view in a 1947 interpretive bulletin. See 12 Fed. Reg. 7655 (Nov. 18, 1947) (29 C.F.R. Pt. 790). The Department explained that changing clothes "may in certain situations be so directly related to the specific work the employee is employed to perform that it would be

regarded as an integral part of the employee's 'principal activity.'" *Id.* at 7659 n.49. This Court subsequently agreed in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), holding that "activities performed either before or after the regular work shift * * * are compensable under the portal-to-portal provisions of the [FLSA] if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed." *Id.* at 256. In *Steiner* itself, this Court concluded that changing into and out of "old but clean work clothes" on the employer's premises was integral and indispensable to the battery plant workers' principal activities and thus compensable. *Id.* at 251, 254-256.

The Department's interpretive bulletin caused concern among many employers. During hearings in the late 1940s, for example, trade associations urged Congress that activities like changing clothes, even when integral to an employee's performance of his duties, should not be compensable under the FLSA if that was not the prevailing custom or practice in the relevant industry. See *Fair Labor Standards Act Amendments of 1949: Hearings on S. 653 Before Subcomm. of the S. Comm. on Labor and Public Welfare*, 81st Cong., 1st Sess. 394 (1949) (statement of the National Association of Manufacturers); *Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938: Hearings Before Subcomm. No. 4 of the H. Comm. on Education and Labor*, 80th Cong., 1st Sess. 2845 (1947) (statement of Joseph M. Creed, Counsel, American Bakers Association, and William A. Quinlan, General Counsel, Associated Retail Bakers of America) (*1947 FLSA Hearings*). The trade associations contended that "[m]anagement and labor" should not be "prevented from settling by collective bargaining the question of

what is properly to be included in measured working time." *Ibid.*

To accomplish that end, Representative Christian Herter introduced an amendment to the FLSA that would have allowed employers and unions to bargain over the compensability of any work activity. See 95 Cong. Rec. 11,210 (1949). Representative Herter specifically addressed how his proposed amendment would affect time spent changing clothes:

> In the bakery industry, for instance, which is 75 percent organized, there are collective-bargaining agreements with various unions in different sections of the country which define exactly what is to constitute a working day and what is not to constitute a working day. In some of those collective-bargaining agreements the time taken to change clothes and to take off clothes at the end of the day is considered a part of the working day. In other collective-bargaining agreements it is not so considered. But, in either case the matter has been carefully threshed out between the employer and the employee and apparently both are completely satisfied with respect to their bargaining agreements.

Ibid. Representative Herter's amendment was subsequently narrowed by the Conference Committee to apply only to time spent changing clothes or washing one's person, and in that form it was enacted as the current Section 203(*o*). See Fair Labor Standards Amendments of 1949, ch. 736, 63 Stat. 911.

As the history of Section 203(*o*) demonstrates, the term "clothes" was not meant to capture any particular type of work apparel depending on its function (whether sanitation, protection, or something else). That term covers the garments worn by bakers; the potterymakers

in *Anderson*, who were "putting on aprons and overalls, removing shirts, taping or greasing their arms, [and] putting on finger cots," 328 U.S. at 683; and workers in other industries who put on and take off apparel to perform their duties. The term "clothes" in Section 203(*o*) refers to articles of dress that workers are required to wear (by law, workplace rule, or the nature of the work) in order to perform their jobs. And the phrase "changing clothes" in Section 203(*o*) refers to employees' putting on and taking off those articles of dress at their workplaces in preparation to perform their jobs.

3. The purpose of Section 203(o) is to allow negotiation over changing time in industries that require job-specific clothing

Section 203(*o*) permits employers and employees with collective bargaining agreements to negotiate over the compensability of time spent changing into and out of work clothes at the beginning and end of the workday. See, *e.g.*, *Sepulveda*, 591 F.3d at 218 ("Section 203(*o*) reflects Congress's intention to give private parties greater discretion to define the outer limits of the workday."). Neither Section 203(*o*)'s text nor its purpose suggests that its application should depend on the material out of which specialized clothing is made or the function such clothing serves (whether sanitation, protection, identification, decoration, or something else). Accordingly, there is no apparent reason to differentiate between steelworking and other industries in which workers change into and out of work clothes. See Pet. App. 6a-7a. Negotiation under Section 203(*o*) should not be limited to only a subset of unionized industries in which employees wear job-specific clothing to perform their duties.

The facts of this case bear out that point. Since 1947, respondent has negotiated national collective bargaining agreements with petitioners' union, the United Steelworkers of America. Each of those agreements provided that respondent was not obligated "to compensate for any travel or walking time or time spent in preparatory and closing activities on the employer's premises * * * for which compensation is not paid under present practices." Resp. C.A. Br. A57; Pet. Br. 11. From 1947 to the present, respondent has not compensated employees for donning-and-doffing time. See Pet. App. 52a, 59a. As part of the most recent five-year collective bargaining agreement in 2008, USW agreed with respondent that the provision for "time spent in preparatory or closing activities" covers "such things as donning and doffing of protective clothing (including such items as flame-retardant jacket and pants, metatarsal boots, hard hat, safety glasses, ear plugs, and a snood or hood)." Resp. C.A. Br. A59. In light of that evidence, the district court found that "the issue of non-compensation has been addressed and agreed to between the company and the union since 1947." Pet. App. 59a.

Respondent and USW thus have long shared the understanding that steelworking should not be treated differently from other industries covered by Section 203(*o*)—*i.e.*, that when steelworkers don and doff flame-retardant garments and other items at the beginning and end of each workday, they are "changing clothes." See 95 Cong. Rec. at 11,210 ("[T]he matter has been carefully threshed out between the employer and the employee and apparently both are completely satisfied with respect to their bargaining agreements."). Because respondent and USW have shared that understanding, respondent's employees presumably have received some

other benefit in return for the lack of compensation for donning-and-doffing time. As the court of appeals explained, "[t]he steelworkers would not have given up their statutory entitlement to time and a half for overtime, when changing clothes or traveling to and from their work stations, without receiving something in return" like a higher hourly wage or other concessions. Pet. App. 8a. Petitioners do not point to any reason to remove that subject for negotiation from the collective bargaining process and thereby disrupt long-settled industry custom and practice.

B. Petitioners' Counterarguments Lack Merit

Petitioners advance various arguments why all of the items they wear at work—including their hoods, jackets, gloves, wristlets, pants, and leggings—are not "clothes" under Section 203(*o*). Those arguments do not withstand scrutiny.

1. Petitioners lack a clear test for determining whether items worn by workers are "clothes" for purposes of Section 203(o)

As an initial matter, petitioners do not clearly state their proposed test for determining whether items worn on the human body are "clothes." Indeed, they say that the term "defies precise definition" and that "[i]t would be quite impossible to devise a single formulation that depicts the diverse ways in which people use the term 'clothes.'" Br. 19. According to petitioners, that term's meaning turns on "[s]everal different factors," including the amount of space that an item occupies on the body, *ibid.*; whether the item is worn on the extremities, *ibid.*; whether the item is made of cloth or some other substance, Br. 20; and whether the item's "primary purpose[]" is "modesty" or "comfort," *ibid.* In addition, pe-

titioners contend that "[w]hether a particular speaker would describe a particular item as 'clothes'" may depend on the speaker's age or level of sophistication, the place where the speaker lives, or evolving cultural customs. Br. 20-21.

That array of factors does not provide reasonable certainty for employers and employees. It also does not supply a judicially administrable test, and petitioners do not explain how jurists could apply their approach with any consistency. In any event, petitioners' list of factors is irrelevant to the meaning of the term "clothes" in Section 203(*o*). For example, socks are worn on the extremities and thus cover a comparatively small area of the human body, but they are no less "clothes" because they cover the feet rather than the head and torso. If someone added a pair of socks to an existing outfit, it might be uncommon to say in casual conversation that the person had put on clothes, because the act would typically be described with greater precision as putting on socks. But when socks are included as part of the person's outfit, they would readily be regarded as part of his "clothes." And when a person changes his outfit, putting on or taking off socks in the course of doing so would readily be regarded as part of his "changing clothes." Nor does it matter whether the apparel is made of fabric. Coats made of leather or fur, for instance, are commonly regarded as clothes.

Petitioners also err in looking to the wearer's motive for covering his body. Petitioners correctly note (Br. 21-22) that a previous edition of *Webster's Third* defined clothes as "[c]overing for the human body; dress; vestments; vesture;—a general term for whatever covering is worn, or is made to be worn, for decency or comfort." *Webster's New International Dictionary of the English*

Language 507 (2d ed. 1957) (*Webster's Second*). The Ninth Circuit relied on that definition in *Alvarez*. See 339 F.3d at 905. But many coverings are not worn for "decency or comfort," if that phrase is interpreted narrowly—formal attire and costumes, for instance—that are normally thought of as clothing. And if comfort is defined broadly as "freedom from pain, or trouble," *Webster's Second* 536, or "an appurtenance or condition ministering to mental or physical ease," *ibid.*, then coverings worn for virtually any reason—including protection—are clothing. Either way, the phrase "decency or comfort" should not be treated as a substantive restriction on the types of coverings worn on the body that may qualify as "clothes" for purposes of Section 203(*o*). Petitioners themselves recognize as much (Br. 33 n.30), noting that many items not worn for decency or comfort are nonetheless clothes.

2. Protection is a common function of clothes, especially clothes worn in a particular type of workplace

a. Although petitioners do not present any generally applicable definition for the term "clothes" in Section 203(*o*), they argue that the term "should be interpreted to exclude items that * * * are used to protect employees against workplace hazards and were designed to provide such protection." Br. 43. According to petitioners, an item is not "clothes" if it was "specifically designed to have a protective function." Br. 60. But that is incorrect for the reason given by the court of appeals: "Protection—against sun, cold, wind, blisters, stains, insect bites, and being spotted by animals that one is hunting—is a common function of clothing." Pet. App. 6a; see *Sepulveda*, 591 F.3d at 215 ("Clothes commonly protect the people who wear them, either from weather conditions or physical hazards, and the fact they are

worn for that very purpose does not mean that they cease to be clothes."). A cloth jumpsuit remains an item of clothing when it is worn by a car mechanic as protection against oil and grease, see *Kassa* v. *Kerry, Inc.*, 487 F. Supp. 2d 1063, 1067 (D. Minn. 2007), just as a heavy parka remains an item of clothing when it is worn by a worker in a cold storage freezer as protection against cold and frostbite.[5]

As the court of appeals further observed, protection is "an especially common function of work clothes worn by factory workers." Pet. App. 6a. Indeed, that is often the very reason for requiring employees to change into and out of particular clothes: to protect them from hazards unique to a given work environment. Donning and doffing such specialized protective clothing therefore constitutes "changing clothes" under Section 203(*o*). Petitioners' contrary approach would exclude the types of work clothing worn in many industrial professions that should lie at the core of Section 203(*o*). See *ibid.* ("It would be absurd to exclude all work clothes that have a protective function from [S]ection 203(*o*), and thus limit the exclusion largely to actors' costumes and waiters' and doormen's uniforms."). Moreover, Section 203(*o*)

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[5] Petitioners argue (Br. 48-50) that "clothing" can be protective but "clothes" cannot. There is no relevant distinction between those terms, see *Anderson*, 488 F.3d at 955 (noting that *Webster's Third* defines 'clothes' as 'clothing'"), and accordingly the courts of appeals have used the terms interchangeably, see *Sepulveda*, 591 F.3d at 215. Petitioners cite (Br. 50) the definition of the term "blue collar" in *Webster's Third*, but there work clothes are being contrasted with dress clothes. In that context, it makes sense to refer to "work clothes or protective clothing" to cover both laborers who wear nondress clothes generally (like farmers and warehouse workers) and laborers who change into a particular kind of protective clothing at work (like mechanics or miners).

covers "not only clothes-changing time but also washing-up time," *ibid.*, and washing-up time is generally necessary in industries in which work clothes serve a protective rather than an ornamental or sanitary purpose. See *id.* at 6a-7a.

Petitioners' contrary approach also would be inconsistent with the background against which Section 203(*o*) was enacted. In the floor colloquy for the Portal-to-Portal Act that this Court relied upon and reproduced in *Steiner*, 350 U.S. at 256-259, a sponsor of the Act, Senator Cooper, confirmed that the hazards of working in a chemical plant might require "special clothing" and that changing into such clothing would be a principal activity constituting part of the workday. See *id.* at 258 (quoting 93 Cong. Rec. 2298 (1949)). The Department of Labor in turn issued authoritative guidance on the Portal-to-Portal Act and relied upon that reference in the floor colloquy to explain that "changing clothes" in a chemical plant must be compensated. See 29 C.F.R. 790.8(c); 12 Fed. Reg. at 7660. The Department's regulation formed part of the backdrop against which Section 203(*o*) was enacted, see *Steiner*, 350 U.S. at 255 n.9; *1947 FLSA Hearings* 2764, and it remains in effect today, see 29 C.F.R. 790.8(c) (2013).

b. Petitioners argue that modern-day work apparel is far different from "[t]he clothes that Congress would have had in mind when it enacted" Section 203(*o*). Br. 44 (emphasis omitted). That is not correct: steelworkers in the 1940s also wore similar protective clothing, but the clothing generally was made of asbestos. See, *e.g.*, *The Battle for Safety*, Popular Mechanics, Mar. 1942, at 66, 68-69 (observing that workers in many industries, including steelworking, were equipped "with masks, respirators, goggles and face shields, head

guards, Neoprene clothing, rubber aprons, metal capped shoes and asbestos outfits"); *ibid.* ("Bethlehem Steel protects open hearth men with asbestos clothing."). Technological advances have resulted in substantial improvements in the types of available protective clothing, but the items worn by steelworkers today are not different in kind from those worn by their twentieth-century predecessors (including when respondent and USW began negotiating over changing-clothes time in 1947). And even assuming Congress did not have in mind the types of work clothes that presently exist, Section 203(*o*) is not limited to the category of clothes that existed at the time of its enactment.

c. Petitioners also argue that, at the time Section 203(*o*) was enacted, "personal safety equipment * * * was regarded as quite distinct from clothes." Br. 47. It is correct that not everything worn on, or attached to, one's body qualifies as clothing. As explained above, the term "clothes" refers to apparel, garments, or articles of dress that employees are required to wear in order to perform their work duties. The term "clothes," however, does not include equipment, *i.e.*, apparatuses, devices, implements, or tools that are distinct from attire and that are used or worn in addition to attire for a particular work-related purpose. Welding helmets, respirators, and scuba tanks, for instance, are all worn on the body but are not commonly regarded in themselves as "clothes." Those types of items are regarded instead as equipment used or worn in addition to attire for a particular reason.

A distinction between clothes and equipment is reflected in materials roughly contemporaneous with the enactment of Section 203(*o*). For example, in *In re Big Four Meat Packing Cos.*, 21 War Labor Rep. 652 (1945),

the War Labor Board ordered the major meatpacking companies to compensate workers for the time spent changing clothes and apparel, noting that federal meat inspection regulations required "aprons, frocks and other outer clothing" to be clean and washable. *Id.* at 655. It also ordered the companies to supply the employees with "(a) all special purpose outer working garments *and equipment* peculiar to the industry which, because of the nature of the work or the requirements of the meat inspection regulations, it is necessary for the employees *to wear* while performing their work; and (b) all safety and protective devices and all tools and equipment necessary for the work." *Ibid.* (emphasis added).

The War Labor Board described "work clothing" as including "smocks, overalls, frocks, uniforms, boots, rubbers, leather aprons, raincoats, and gloves." 21 War Labor Rep. at 673. The Board distinguished those items from "knives, steels, whetstones, *metal guards*, and *other protective and safety equipment*." *Id.* at 673 (emphasis added); see *id.* at 672 (noting that companies furnished "certain protective equipment such as metal guards and certain apparel such as raincoats and rubber boots"). Other decisions of the War Labor Board from that era reflect a distinction between clothes and equipment. See *In re Continental Baking Co.*, 18 War Labor Rep. 470 (1945); *In re Swift & Co., Armour & Co.*, 21 War Labor Rep. 709, 710-711, 718-719 (1945); *In re Swift & Co.*, 21 War Labor Rep. 724, 725, 730 (1945); *In re John Morrell & Co.*, 21 War Labor Rep. 730, 733 (1945).

Similarly, a 1952 study of collective bargaining agreements in the meatpacking industry discussed provisions for "clothes-changing time" and provisions for furnishing "tools, equipment, and safety devices." U.S. Dep't of Labor, Bureau of Labor Statistics, Bulletin

No. 1063, *Collective Bargaining in the Meat-Packing Industry*, H.R. Doc. No. 391, 82d Cong., 2d Sess. 21 (1952). The study quoted one agreement stating that the company would furnish "safety equipment and, in addition, * * * mesh gloves, wrist guards, knife guards, leather aprons, hook pouches, knife pouches, knife boxes, needle pouches, helmets and goggles. All of the equipment referred to [herein] is to remain the property of the Company." *Id.* at 22; see Pet. Br. at 5, 8, *Steiner*, *supra* (describing the respirators and gloves worn by its plant workers as "special equipment").[6]

Similarly, this Court in *IBP, Inc.* explained that workers in the meat industry must wear "a variety of *protective equipment* for their hands, arms, torsos, and legs" and that "this gear includes chain link metal aprons, vests, plexiglass armguards, and special gloves." 546 U.S. at 30 (emphasis added); see also *Butterball, LLC*, 644 F.3d at 1137 (observing that "specialized apparel and equipment is often worn" in the industrial context); *Franklin*, 619 F.3d at 620 (observing that plant workers were required to "wear[] the uniform and equipment"). Lower courts likewise have indicated that some types of items worn on the body are so distinctive in form and function that they are properly classified as equipment rather than clothes. See, *e.g.*, *Butterball, LLC*, 644 F.3d at 1140 (explaining that the items worn by turkey processing workers were "not so cumbersome,

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[6] The references in contemporaneous sources to clothes (or apparel) and equipment were not necessarily precise. For instance, leather aprons and gloves were sometimes referred to as clothes and sometimes as equipment. But the point is that, in the years surrounding the enactment of Section 203(*o*), agencies, employers, and employees recognized that some items worn on the body qualified as devices, equipment, or tools rather than work clothes.

heavy, complicated, or otherwise different in kind from traditional clothing that they should not be considered 'clothes'"); *Franklin*, 619 F.3d at 614-615 ("[T]here may be some heavier protective equipment than what is at issue here that is not clothing within the meaning of [Section] 203(*o*)."); *Kassa*, 487 F. Supp. 2d at 1067 ("[T]his Court would not likely find that an 'environmental spacesuit' (or an actual spacesuit, for that matter) is 'clothes.'").

In short, although contemporaneous sources and lower court decisions have not always agreed on what might constitute equipment rather than clothing, some items that may be worn or carried by workers on their person are properly treated as equipment such that their donning and doffing does not constitute "changing clothes" under Section 203(*o*). That distinction does not aid petitioners, however, because this case does not involve devices, equipment, or implements that are worn in addition to attire for a particular reason.[7] Rather, as explained above, the items at issue here fall within the ordinary meaning of the term "clothes."[8]

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[7] The district court found that respirators, welding helmets, and aluminized and chemical suits are donned and doffed at employees' workstations and thus that employees are already compensated for such time. See Pet. App. 37a-38a.

[8] The distinction between protective equipment and clothing appears in 2010 guidance provided by the Department of Labor, the most recent in a line of guidance documents principally concerning items worn in the meatpacking industry. See U.S. Dep't of Labor, Administrator's Interpretation No. 2010-2, at 1 (June 16, 2010) (stating that "'clothes' refer[s] to apparel, not to protective safety equipment which is generally worn over such apparel and may be cumbersome in nature") (internal quotation marks omitted). As the Department noted in that guidance, it has not taken a consistent position on the meaning of the term "clothes" in Section 203(*o*). Prior to 1997,

Petitioners argue (Br. 31-32 & n.29) that by defining the term "clothes" to include what they wear at work, the lower courts swept within Section 203(*o*) all things worn on, or in any way attached to, the body. As an initial matter, that has not proven to be a concern in practice. The vast majority of items listed by petitioners (Br. 31 n.29) are not items that must be worn by workers in any particular industry. As a result, the question of whether such items constitute "clothes" for purposes of Section 203(*o*) has not arisen with any frequency in litigation. Petitioners do not point to a single case dealing with anything "from back braces, barrettes and bandoliers to wigs and wristwatches." Br. 31. In any event, as explained above, petitioners err in assuming that anything worn on or attached to the body must qualify as "clothes" under Section 203(*o*). Items like "brass knuckles," "nicotine patches," and "pocket protectors" are

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the Department had not issued a written interpretation or implemented an administrative practice or enforcement policy regarding the meaning of the phrase "changing clothes" in Section 203(*o*). See U.S. Dep't of Labor, Wage and Hour Division, Opinion Letter, 2001 WL 58864 (Jan. 15, 2001); see also U.S. Dep't of Labor, Wage and Hour Division, Opinion Letter (June 6, 2002). In 1997, 1998, and 2001, the Department issued opinion letters taking the position that items described as protective equipment were not "clothes." In 2002 and 2007, it took the contrary position in two opinion letters, and in 2002 the Department filed a brief in the Ninth Circuit in *Alvarez* stating that items worn by meatpackers are "clothes"—a position the Ninth Circuit rejected. See 339 F.3d at 905 n.9. (The Department did not address the changing-clothes issue in its amicus brief in the Seventh Circuit in this case, instead addressing only whether walking time was compensable.) The Department's 2010 guidance rescinded portions of the 2002 and 2007 opinion letters and returned to the view set forth in its earlier opinion letters. See Pet. App. 18a. The government does not urge deference to the 2010 Administrator's Interpretation in the context of this case.

commonly thought of not as clothing but as devices, equipment, or tools that are worn in addition to one's attire for a particular reason. Br. 31 n.29.

3. Section 203(o) is not an exemption from the FLSA that must be narrowly construed

Petitioners argue (Br. 51-56) that Section 203(*o*) is an exemption that must be narrowly construed against respondent as an employer. The Ninth Circuit assumed as much without analysis in *Alvarez*, see 339 F.3d at 905, but the courts of appeals to consider the question subsequently have recognized that Section 203(*o*) is not an exemption. See *Butterball, LLC*, 644 F.3d at 1138; *Franklin*, 619 F.3d at 612; *Allen* v. *McWane, Inc.*, 593 F.3d 449, 458 (5th Cir.), cert. denied, 131 S. Ct. 73 (2010); *Anderson*, 488 F.3d at 957; cf. *Adams* v. *United States*, 471 F.3d 1321, 1325-1326 (Fed. Cir. 2006), cert. denied, 552 U.S. 1096 (2008). The provision at issue here appears in Section 203, which is entitled "Definitions," and it does not exempt any classes of employees—or even any classes of activities—from the FLSA altogether. Cf. *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172 n.21 (2012) (noting that rule requiring narrow construction of exemptions is inapplicable to FLSA's definition of "sale" in Section 203(k)). Rather, Section 203(*o*) "gives employers and employees the *option* of removing [clothes-changing and washing-up] activities from FLSA coverage through collective bargaining." *Butterball, LLC*, 644 F.3d at 1138.

Petitioners argue (Br. 52-54) that even if Section 203(*o*) is an exclusion, it should be narrowly construed as if it were an exemption. Petitioners contend that this Court should not recognize "a distinction between exemptions and exclusions." Br. 53. There is no need to resolve that question, however, because Section 203(*o*)

does not function like a typical exclusion: it does not place changing-clothes and washing-up time outside the Act as a categorical matter. It merely provides that, where there is a collective bargaining agreement, the employer and the union may negotiate over the compensability of such time through the collective bargaining process. Petitioners do not cite any authority for the proposition that when the FLSA leaves the compensability of certain activities to negotiation between employers and unions on behalf of covered employees, the scope of those affected activities must be construed narrowly against negotiation.

4. OSHA regulations confirm that petitioners change into and out of a type of work clothes

Petitioners rely (Br. 57-60) on regulations under the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. 651 *et seq.*, that require employers to supply workers with personal protective equipment but not ordinary or everyday clothing. The Ninth Circuit relied on one of those regulations, 29 C.F.R. 1910.1030(b), in *Alvarez*. See 339 F.3d at 905. But that regulation defines "personal protective equipment" as "specialized *clothing or equipment* worn by an employee for protection against a hazard." 29 C.F.R. 1910.1030(b) (emphasis added). The regulation thus recognizes that at least some of what it calls personal protective equipment is a specialized form of, and falls within the larger category of, clothing. See *Sepulveda*, 591 F.3d at 215. As explained above, see pp. 10-11, *supra*, that is consistent with the ordinary meaning of "clothes," which includes both general types of clothing worn by large segments of the working population and specialized types of clothing worn only by workers in particular fields or industries.

Moreover, Section 1910.1030(b) contrasts personal protective equipment with "[g]eneral work clothes" like "uniforms, pants, shirts or blouses." OSHA has elsewhere explained that employers do not have to pay for furnishing "[e]veryday clothing, such as long-sleeve shirts, long pants, street shoes, and normal work boots," or "[o]rdinary clothing * * * used solely for protection from weather, such as winter coats, jackets, gloves, parkas, rubber boots, hats, raincoats, [and] ordinary sunglasses." 29 C.F.R. 1910.132(h)(4)(ii) and (iii). OSHA regulations therefore treat the types of items worn by petitioners here—jackets, pants, gloves, hoods, and boots—as clothing. The question under the OSHA regulations is simply whether those clothes are meant to protect petitioners from employment-related hazards (and therefore whether respondent must supply the clothes at its expense). Nothing in the OSHA regulations indicates that the items at issue here are not "clothes" for purposes of Section 203(*o*).

C. Petitioners Are "Changing" Into Their Work Clothes Regardless Of Whether They First Remove Their Street Clothes

Petitioners argue (Br. 22-28) that the term "changing" in Section 203(*o*) refers only to the substitution of work clothes for street clothes, not the layering of work clothes on top of street clothes. Petitioners presented that argument to the court of appeals, see Pet. C.A. Br. 32-34, but that court did not address it and petitioners did not present the argument to this Court at the certiorari stage as a basis for reversing the judgment below. See, *e.g.*, *Chaidez* v. *United States*, 133 S. Ct. 1103, 1113 n.16 (2013) (declining to consider arguments in part because "[petitioner] did not include those issues in her petition for certiorari"). In any event, the courts of ap-

peals to consider the question correctly have held that an employee is "changing" when he puts on and takes off work clothes, regardless of whether he first removes his street clothes.

The ordinary meaning of "change" is "to make different"—that is, "to make different in some particular way but short of conversion into something else." *Webster's Third* 373; see *Webster's Ninth New Collegiate Dictionary* 225 (1989) (defining "change" as "to make different in some particular"). The term's ordinary meaning therefore encompasses an employee's donning work clothes over street clothes, because that employee has made his attire different or modified it in some way. See, *e.g.*, *Sepulveda*, 591 F.3d at 216 ("[O]ne can also change something by modifying it. Accordingly, the employees' act of donning and doffing their equipment fits comfortably within the meaning of 'changing.'"); *Anderson*, 488 F.3d at 956 ("Nothing in the statute's language suggests that its application turns on whether one must fully disrobe or exchange one shirt, for example, for another.").[9]

Petitioners are correct (Br. 23) that in some contexts, like diapers or tires, "changing" refers to substitution because the items are not meant to be layered. But in the context of dressing oneself, "changing" commonly refers to removing certain clothes and putting on others

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[9] Petitioners rely (Br. 23) on a single district court decision, *Fox* v. *Tyson Foods, Inc.*, No. CV-99-BE-1612, 2002 WL 32987224 (N.D. Ala. Feb. 4, 2002). That decision was subsequently reversed as inconsistent with the Eleventh Circuit's intervening decision in *Anderson*. See *Fox* v. *Tyson Foods, Inc.*, No. 4:9-CV-1612, 2007 WL 6477624, at *1 (N.D. Ala. Aug. 31, 2007) ("The plaintiffs concede that *Anderson* reverses the court's conclusion that [Section] 203(*o*) does not apply to their pre-and post-shift clothes changing activities.").

or to placing new clothes on top of one's existing outfit. This is true, for example, when a Member of this Court puts on a robe before taking the bench. By placing new apparel over old, one's set of clothes has changed. As petitioners observe (Br. 25 & n.18), when one changes clothes for a particular event or occasion, that typically implies removal of one outfit and substitution of another, more appropriate one. But petitioners mistake the typical fact pattern for an exclusive one.

Nor would it make sense to interpret Section 203(*o*) as imposing a requirement that an employee replace his street clothes with work clothes. Employees could drift in and out of FLSA coverage depending on the season and even the day, or the dressing habits of particular employees. See *Sepulveda*, 591 F.3d at 216 ("[C]ompensation for putting on a company-issued shirt might turn on some thing as trivial as whether the employee did or did not take off the t-shirt he wore into work that day."). Indeed, on petitioners' view, FLSA coverage would depend on whether employees changed clothes in a single place or in multiple places. See, *e.g.*, *Anderson*, 328 U.S. at 682-683 (noting that employees exchanged their street clothes for some of their work clothes in locker rooms and then donned other clothing at their work sites). The courts of appeals have correctly concluded that there is "no logic" to such a haphazard approach. *Anderson*, 488 F.3d at 956.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 2013

AMICUS CURIAE BRIEF

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AND
BRIEFS

Supreme Court, U.S.
FILED
MAY 20 2013
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No. 12-417

IN THE

Supreme Court of the United States

CLIFTON SANDIFER, *et al.*,
Petitioners,
v.
UNITED STATES STEEL CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of approximately 12 million working men and women.[1]

The United Food and Commercial Workers International Union (UFCW) is a labor organization of 1.3 million members representing workers across the United States in various industries, including meat packing, poultry processing, and other food processing.

This case involves § 3(o) of the Fair Labor Standards Act (FLSA), which "exclude[s] from measured working time" for purposes of the FLSA's minimum wage and overtime requirements "any time spent in changing clothes or washing at the beginning or end of each workday" if such time is excluded by a "bona fide collective bargaining agreement." 29 U.S.C. § 203(o). AFL-CIO-affiliated unions and the

---

[1] Counsel for the petitioners and counsel for the respondent have each consented to the filing of this *amicus* brief. No counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief.

UFCW regularly engage in collective bargaining over pay for clothes-changing and washing time and thus have a strong interest in the proper interpretation of § 3(o).

STATEMENT

Clifton Sandifer and several other employees of U.S. Steel Corporation filed a collective action complaint under the FLSA against U.S. Steel for failing to pay employees required minimum wages and overtime for time spent putting on and taking off various items in the company locker room at the beginning and end of each work day, as well as for several other violations of the FLSA. The items at issue include "flame-retardant jackets and pants [], safety glasses, a hard hat, protective footwear (steel-toed shoes with metatarsal guards), gloves, hearing protection, snoods, spats, leggings, and[] wristlets." *Sandifer v. U.S. Steel Corp.*, 2:07-CV-443, 2009 U.S. Dist. LEXIS 96715, *5 (N.D. Ind., Oct. 15, 2009).

U.S. Steel contended that it was not liable to the employees under the FLSA for the clothes-changing time because the listed items constitute "clothes" within the meaning of § 3(o) and the company had entered into a collective bargaining agreement with the employees' representative that made such clothes-changing time non-compensable. Sandifer argued, in contrast, that the items are not clothes, but safety equipment, and that § 3(o) therefore did not apply.

The court of appeals agreed with the company that the bulk of the items at issue constituted clothes within the meaning of § 3(o). *Sandifer v. U.S. Steel*

Corp., 678 F.3d 590, 594 (7th Cir. 2012). Although the court concluded that the safety glasses, ear plugs, and hard hat were not clothes, it found that the time it took for each employee to don and doff these items was *de minimus* and, for that reason, not compensable. *Id.* at 593. Ruling against the plaintiffs on all of their FLSA claims, the court of appeals dismissed the suit.

Petitioners filed a petition for a writ of certiorari, seeking review of several aspects of the court of appeals' decision. The Court granted the writ of certiorari limited to the following question: "What constitutes 'changing clothes' within the meaning of section 203(o)?"

SUMMARY OF ARGUMENT

Section 3(o) was added to the FLSA as part of a package of amendments in 1949. In enacting these amendments, the phrase "time spent in changing clothes" was added by a conference committee as a limitation to the original version of § 3(o) passed by the House of Representatives that would not have counted "*any* time" excluded by a collective bargaining agreement from "measured working time" for purposes of the FLSA's minimum wage and overtime provisions.

By so precisely limiting the scope of topics over which employers and unions can bargain different pay arrangements than required by the FLSA, Congress indicated that it had a specific understanding of the phrase "time spent in changing clothes." That understanding was based on the practice of bargaining for compensation for the otherwise personal activity of changing out of street clothes and into

clothing or uniforms which could not be worn outside the plant in industries such as baking and meat packing, bargaining that had been required by the National War Labor Board and that continued into the immediate post-war period when § 3(o) was enacted.

Importantly, the War Labor Board distinguished such clothes-changing from the donning and doffing of protective and safety equipment, which it considered to be on the same footing as the preparation of company-owned tools and equipment. Unlike changing clothes, which, except in unusual circumstances, was considered a purely personal and thus uncompensated activity, the Board considered the donning and doffing of protective and safety equipment to be an integral part of an employee's work that should be compensated on the same basis as other work.

Because the court of appeals utilized an incorrect understanding of the statutory phrase "time spent changing clothes," it incorrectly characterized several items of safety equipment as clothes. This Court should, therefore, reverse the court of appeals' decision and remand so that the court can apply the correct legal standard to the items at issue in this case.

ARGUMENT

Section 3(o) of the Fair Labor Standards Act provides that in calculating an employee's working time for purposes of the Act's minimum wage and maximum hours provisions, "there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday" which is "excluded from measured working time" by "a bona fide col-

lective bargaining agreement." 29 U.S.C. § 203(o). The question presented by this case is what constitutes "time spent in changing clothes" for purposes of a collectively bargained exclusion from "measured working time."

Section 3(o) was added to the Fair Labor Standards Act in 1949. At that time, the phrase "changing clothes" had a well-established meaning under collectively bargained compensation schemes that had been mandated in several industries by the National War Labor Board. *See The Termination Report of the National War Labor Board*, vol. 1, pp. 387-88 (1947) ("Time Spent Changing Clothes"). *See also id.* at 1045-49 ("The Meat Packing Commission"). Under those compensation schemes, the phrase "changing clothes" – like the term "washing" – referred to a "purely personal activit[y]" "by which the individual gets himself ready for his daily tasks or for his return home after the day is ended." *Big Four Meat Packing Cos.*, 21 War Labor Rep. 652, 672 (1945).

Significantly for present purposes, the War Labor Board treated an employee's preparation of "safety and protective devices" as an activity distinct from "changing clothes." *Swift & Co.*, 21 War Labor Rep. 709, 711 (1945). The War Labor Board was reluctant to order compensation for time spent in "changing clothes," except where the employees were required "to wear special clothing or uniforms which must be kept clean and which may not be worn outside the plant," conditions that were common in industries, such as baking and meat packing, "involving the preparation and handling of food products." *Labor-*

Management Contract Provisions 1953, Bureau of Labor Statistics Bulletin No. 1166, p. 14 (1954). In the War Labor Board's view, "[t]he time spent in preparing tools and working equipment st[ood] on a separate footing," because "[t]his is an activity which is an integral part of a man's work." *Big Four Meat Packing Cos.*, 21 War Labor Rep. at 672. And, the Board made clear that for purposes of determining compensated time, the category of "tools, includes . . . metal guards, and other protective and safety equipment." *Id.* at 673.

By excluding from FLSA working time "any time spent in changing clothes or washing" that is "excluded from measured working time" by "a bona fide collective bargaining agreement," 29 U.S.C. § 203(o), Congress intended to preserve the sort of compensation schemes established by the decisions of the War Labor Board. Under those schemes, "changing clothes" is the act of changing out of "ordinary street clothes," *Big Four Meat Packing Cos.*, 21 War Labor Rep. at 671, and into apparel of a type that "may be worn only when at work," *Continental Baking Co.*, 18 War Labor Rep. 470, 471 (1944). "Changing clothes" does not, by contrast, include the activity of donning "protective and safety equipment." *Big Four Meat Packing Cos.*, 21 War Labor Rep. at 673.

1. Section 3(o) was enacted as part of the Fair Labor Standards Amendments of 1949, Pub. L. No. 81-393 § 3(d), 63 Stat. 910, 911 (1949). In signing the 1949 legislation into law, President Truman explained that "this amendatory act will . . . [e]ncourage the development of plans for employment on an annual basis through collective bargaining by providing

greater flexibility in the overtime provisions. These plans assure stability of income for wage earners and stability of operation for employers." Harry S. Truman, Statement by the President Upon Signing the Fair Labor Standards Amendments, Oct. 26, 1949. In keeping with this statutory purpose, the amendments provided for a number of collectively bargained exceptions to the requirements of the FLSA. *See* Pub. L. 81-393 §§ 7(b), 7(d)(7), & 7(e), 63 Stat. at 913-14 (codified as amended at 29 U.S.C. §§ 207(b), 207(e)(7) & 207(f)).

As introduced, the 1949 amendments did not contain the § 3(o) exclusion. *See generally* H.R. Conf. Rep. No. 81-1453 (Oct. 17, 1949), *reprinted in* 1949 U.S.C.C.A.N. 2251. Section 3(o) originated in a floor amendment offered by Representative Christian Herter of Massachusetts that would have excluded for FLSA purposes "*any time* which was excluded from measured working time" by "a bona fide collective bargaining agreement." 95 Cong. Rec. 11,210 (1949) (emphasis added). The House adopted this amendment with very little debate, but only a much more limited version of the collective bargaining exclusion was accepted in conference. As the conference report explained, § 3(o) as enacted "limits this exclusion to time spent by the employee in changing clothes and cleaning his person at the beginning or at the end of each workday." H.R. Conf. Rep. No. 81-1453, *reprinted in* 1949 U.S.C.C.A.N. at 2255.

Representative Herter explained that the purpose of his floor amendment was to give effect to "the determinations of what constitutes hours of work

which have been spelled out in many collective-bargaining agreements." 95 Cong. Rec. 11,210. He cited, in particular, the example of "the bakery industry" in which the question of whether "the time taken to change clothes and to take off clothes at the end of the day is considered a part of the working day . . . has been carefully threshed out" in the "collective bargaining agreements." *Ibid.*

The baking industry was the first place where the War Labor Board directed a collectively bargained resolution of the issue of compensation for time spent changing clothes. In *Continental Baking Co.*, 18 War Labor Rep. at 471-72, the Board determined that, where "[a]s an incident of their employment, [employees] are required to wear clothing made of a washable material which must be kept clean at all time and which may be worn only when they are at work," "payment should be made by the company for this branch of the employees' activity." The Board then reached the same conclusion with respect to required workplace clothes-changing in the meat packing industry. *Big Four Meat Packing Cos.*, 21 War Labor Rep. at 655.

Recognizing that "administrative difficulties preclude an exact measurement of the time reasonably consumed by each individual employee in putting on and removing his uniform," the Board directed that any compensation for changing clothes be based on "a fair estimate of time spent in this task." *Continental Baking Co.*, 18 War Labor Rep. at 472. In *Continental Baking*, the Board made such an estimate itself, *ibid.*, but in the meat packing cases, it "referred back to the parties for collective bargain-

ing" the determination of a "reasonable allowance for such time," *Big Four Meat Packing Cos.*, 21 War Labor Rep. at 655. The resulting collective bargaining agreements provided a specified amount of compensated time to cover clothes-changing rather than including clothes-changing time as part of the other measured working time. *Collective Bargaining in the Meat-Packing Industry*, Bureau of Labor Statistics Bulletin No. 1063, p. 21 (1952). In the meat packing agreements, for example, the allotted paid-time for clothes changing was 12 minutes. *Ibid.*

Because the provisions regarding compensation for time spent changing clothes in the baking and meat packing collective bargaining agreements constituted "an equitable compromise on this troublesome issue," these industries were "spared the portal-to-portal pay suits which were filed in so many other industries in 1946." EDWIN E. WITTE, *Industrial Relations in Meat Packing, in* LABOR IN POSTWAR AMERICA 500 (Colston E. Warne ed., 1949). However, employers in the baking industry became concerned that their collectively-bargained resolution of the clothes-changing issue would be up-ended by the Department of Labor's regulations interpreting the Portal-to-Portal Act of 1947. *See A Bill to Provide For the Amendment of the Fair Labor Standards Act of 1938, and For Other Purposes: Hearings on H.R. 2033 Before the House Comm. on Educ. and Labor*, 81st Cong., 1st Sess. 1565-69 (1949) (statement of William A. Quinlan, General Counsel, Associated Retail Bakers of America).

The Portal-to-Portal Act of 1947 addressed the problems created by the 1946 wave of portal-to-por-

tal pay suits by immunizing employers from FLSA liability for their failure to pay employees for time spent "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" as well as for "activities which are preliminary to or postliminary to said principal activity or activities." 29 U.S.C. § 254(a). However, the Department of Labor's regulations interpreting the Act stated that time spent "changing clothes on the employer's premises at the beginning and end of the workday" did not necessarily constitute preliminary and postliminary activity, but rather would be covered by the FLSA's minimum wage and maximum hours provisions in cases where the employee "cannot perform his principal activities without putting on certain clothes." U.S. Dept. of Labor, General Statement as to the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938, 12 Fed. Reg. 7655, 7660 (Nov. 18, 1947) (codified at 29 C.F.R. § 790.8(c)). This aspect of the regulations seemed directed at precisely the same type of clothes-changing that the War Labor Board had referred to collective bargaining for resolution.

Representatives of various baking industry groups testified before the House and Senate labor committees advocating adoption of the amendment eventually introduced by Representative Herter. The baking industry witnesses testified that without an amendment to the FLSA, "[m]anagement and labor . . . would be prevented from settling by collective bargaining the question of what is properly to be included in measured working time, and established con-

tracts still would be rendered ineffective in this respect." *A Bill to Provide For the Amendment of the Fair Labor Standards Act of 1938, and For Other Purposes: Hearings on H.R. 2033 Before the House Comm. on Educ. and Labor*, 81st Cong., 1st Sess. 1568 (1949) (statement of William A. Quinlan, General Counsel, Associated Retail Bakers of America). "The result of this situation is that if an employer and a union agree upon rates of pay and overtime provisions with an express understanding that certain activities are to be excluded from measured working time, . . . neither party can be certain that such activities will not nevertheless be treated as 'work' for purposes of the Fair Labor Standards Act." *Bills Relative to Federal Labor Standards Act Amendments: Hearings on S. 58, S. 67, S. 92, S. 105, S. 190, S. 248 and S. 653 Before a Subcomm. of the S. Comm. on Labor and Pub. Welfare*, 81st Cong., 1st Sess. 816 (1949) (memorandum submitted by Joseph Creed, Counsel, Pennsylvania Bakers Association on S. 653).

As we have noted, in enacting § 3(o), Congress declined to adopt the broad collective bargaining exception advocated by the baking industry and proposed by Representative Herter. Instead, Congress "limit[ed] this exclusion to time spent by the employee in changing clothes and cleaning his person." H.R. Conf. Rep. No. 81-1453, *reprinted in* 1949 U.S.C.C.A.N. at 2251. In other words, § 3(o) was limited to precisely the sort of collectively bargained "exclu[sions] from measured working time," 29 U.S.C. § 203(o), that had been directed by the War Labor Board in the baking and meat packing industries.

2. The decisions of the War Labor Board give "separate treatment" to the issue of "compensation for time spent in changing clothes on the one hand" and compensation for time spent "in preparing tools on the other." *Swift & Co.*, 21 War Labor Rep. at 718. The Board determined that where time had to be spent changing clothes at the workplace, "it is fair and equitable for the company to make reasonable allowances for such time" and "referred [the matter] back to the parties for collective bargaining." *Id.* at 710. By contrast, the Board treated time spent in the preparation of "safety and protective devices" as similar to time spent preparing other necessary tools and "directed that the present practice of the company of paying for the preparation . . . of large company owned tools shall be extended to cover the preparation . . . of all tools," including the safety devices. *Id.* at 710-11. Under these arrangements, time spent changing clothes was "excluded from measured working time," 29 U.S.C. § 203(o), and was compensated instead based on a reasonable estimate of the necessary time, while time spent in preparing tools, including safety equipment, was compensated like other working time.

The different treatment of compensation for clothes-changing time and for time spent in preparing tools and safety equipment was due to the essentially different character of the two types of activity. Except in extraordinary circumstances, the Board considered "the time spent in dressing and undressing" to be "purely personal activities" "by which the individual gets himself ready for his daily tasks or for his return home after the day is ended" and for which compensation was appropriate only in extraordinary

circumstances. *Big Four Meat Packing Cos.*, 21 War Labor Rep. at 672. In the Board's view, however, "[t]he time spent in preparing tools and working equipment st[ood] on a separate footing" from clothes changing, because "[t]his is an activity which is an integral part of a man's work." *Ibid.* It was generally accepted that "[t]ime spent in such effort may properly be regarded as a proper charge against the business." *Ibid.* Thus, the Board directed that "[t]he present practice of paying for the preparation of company owned tools should be extended to cover the preparation of small tools, which hitherto has been done on the worker's own time." *Ibid.*

War Labor Board decisions from the meat-packing industry draw a sharp distinction between changing clothes and preparing safety devices worn by the employee. The Board made clear that with regard to compensation for time spent preparing tools, the category of "tools includes . . . metal guards, and other protective and safety equipment." *Id.* at 673. *See also Swift & Co.*, 21 War Labor Rep. at 710-11 ("direct[ing] that the present practice of the company of paying for the preparation and repair of large company owned tools shall be extended to cover the preparation and repair of all tools and working equipment which the company is in this order directed to furnish to the employees," including among such "tools and working equipment" "all safety and protective devices"); *John Morrell & Co.*, 21 War Labor Rep. 730, 733 (Feb. 20, 1945) (same). Among the items commonly included in the category of "safety equipment" under the meat packing collective bargaining agreements were "mesh gloves, wrist guards, knife guards, leather aprons, hook

pouches, knife pouches, knife boxes, needle pouches, helmets and goggles." *Collective Bargaining in the Meat-Packing Industry*, Bureau of Labor Statistics Bulletin No. 1063, pp. 22-23.

By rejecting the version of § 3(o) that would have excluded from the FLSA calculation "any time which was excluded from measured working time" by "a bona fide collective bargaining agreement," 95 Cong. Rec. at 11,210, and instead "limit[ing] this exclusion to time spent by the employee in changing clothes and cleaning his person," H.R. Conf. Rep. No. 81-1453, *reprinted in* 1949 U.S.C.C.A.N. at 2255, Congress clearly intended to cover precisely the sort of "exclu[sions] from measured working time" mandated by the War Labor Board. Under the War Labor Board decisions, only the "purely personal activit[y]" of changing from "ordinary street clothes" was excluded from measured working time. *Big Four Meat Packing Cos.*, 21 War Labor Rep. at 671-72. By contrast, the preparation of "all safety and protective devices," *Swift & Co.*, 21 War Labor Rep. at 711, including the donning of "mesh gloves, wrist guards, knife guards, leather aprons, . . . helmets and goggles," *Collective Bargaining in the Meat-Packing Industry*, Bureau of Labor Statistics Bulletin No. 1063, pp. 22-23, was treated as "an integral part of a man's work," the same as any other "preparation of small tools," and was not to be "done on the worker's own time," *Big Four Meat Packing Cos.*, 21 War Labor Rep. at 672.

The phrase "time spent in changing clothes" thus refers to the same clothes-changing considered by the War Labor Board – the "purely personal activit[y]" of changing from "ordinary street clothes" to

work clothes, *id.* at 671-72, but not the donning of safety equipment.

3. The court of appeals in this case proceeded on the understanding that the phrase "changing clothes" in § 3(o) encompasses "clothing in the ordinary sense." *Sandifer*, 678 F.3d at 593. The court did not attempt to explain what it meant by "clothing in the ordinary sense," except to state that the term must include "work clothes," since § 3(o) governs compensation for work. *Id.* at 594. The court did, however, hold that "clothing in the ordinary sense" could encompass "safety equipment." *Ibid.* As the foregoing discussion has demonstrated, the phrase "changing clothes" in § 3(o) clearly does not encompass preparing "safety equipment."

Despite its erroneous understanding of the statutory phrase "changing clothes," the court below did correctly determine that "glasses and ear plugs are not clothing" and suggested that a "hard hat," might be or might not be clothing. *Id.* at 593. However, because the court incorrectly treated safety equipment as a type of clothing, it incorrectly determined that "work gloves, metatarsal boots (work boots containing steel or other strong material to protect the toes and instep), . . . and a 'snood' (a hood that covers the top of the head, the chin, and the neck)" were clothes within the meaning of § 3(o). *Id.* at 592-94. And, the court of appeals took no account at all of a number of additional items of safety equipment that employees were required to don at work, such as "spats," "leggings," and "wristlets." *Sandifer*, 2:07-CV-443, 2009 U.S. Dist. LEXIS 96715, at *5.

None of these items would have been considered "clothes" for purposes of collectively bargained "exclu[sions] from measured time" in 1949. Rather, as we have shown, "protective and safety equipment," *Big Four Meat Packing Cos.*, 21 War Labor Rep. at 672 – including "mesh gloves, wrist guards, knife guards, leather aprons, ... helmets and goggles," *Collective Bargaining in the Meat-Packing Industry*, Bureau of Labor Statistics Bulletin No. 1063, pp. 22-23 – was treated as tools. Therefore, contrary to the determination of the court below, the donning of such safety equipment does not constitute "changing clothes" within the meaning of FLSA § 3(o).

CONCLUSION

The Court should reverse the judgment of the court of appeals.

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AMICUS CURIAE BRIEF

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Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* AMERICAN MEAT INSTITUTE, NORTH AMERICAN MEAT ASSOCIATION, NATIONAL TURKEY FEDERATION, NATIONAL CHICKEN COUNCIL IN SUPPORT OF RESPONDENT

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*[1]

Amicus Curiae American Meat Institute ("AMI") is the oldest and largest national trade association representing packers and processors of beef, pork, lamb, veal, turkey and processed meat products. AMI member companies produce more than 95 percent of the meat products available in the United States. *Amicus Curiae* North American Meat Association ("NAMA") is a national trade association that has been advocating the interests of the meat industry since 1946. NAMA members include packers, processors, and distributors of meat and meat products. *Amicus Curiae* National Turkey Federation ("NTF") is the only national trade association exclusively representing the turkey industry. NTF represents more than 95 percent of the turkey industry in the United States, including breeders, hatchery owners, growers, and processors. The National Chicken Council ("NCC") is the primary trade organization representing the

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[1] Pursuant to Supreme Court Rule 37.3, Petitioners have filed with the Court a letter granting blanket consent to the filing of *amicus curiae* briefs in support of either or neither party and, accordingly, have consented to the filing of this Brief *Amici Curiae*. *See* Docket entry March 11, 2013. In addition, Respondent has given consent to the filing of this Brief *Amici Curiae*. Pursuant to Supreme Court Rule 37.6, *Amici* state that this brief was not authored in whole or part by counsel for a party, and no person or entity, other than *Amici*, made a monetary contribution for the preparation or submission of this brief.

chicken industry in the United States. The member companies of NCC produce and process approximately 95 percent of the chickens in the United States.

There are more than 417,000 workers employed in the meat and poultry packing and processing industries in the United States. AMI, NAMA, NTF and NCC members contribute to the U.S. Gross Domestic Product in an amount exceeding $156 billion annually. These revenues pay workers, shareholders, creditors, other investors, and also contribute significantly to federal, state and local tax revenues through income, sales, real estate and other taxes.

About 60 percent of the workers employed by *Amici* members currently are members of labor organizations which represent their interests with employers through collective bargaining. These union workers and their representatives typically negotiate and execute Collective Bargaining Agreements ("CBAs") for one or more years with *Amici* members. Those CBAs govern the wages, hours, and working conditions of the represented workers. In some cases, *Amici* members and their unions have been parties to CBAs for decades. Many *Amici* members and their unions have expressly addressed clothes-changing time in their CBAs while others have addressed clothes-changing time through established customs and past practices under their CBAs.

Amici and their unionized members have a compelling interest in the question presented by this case. *Amici* members have been inundated with Fair

Labor Standards Act ("FLSA") collective actions seeking compensation for clothes-changing time since the late 1990s despite the fact that many *Amici* members have addressed clothes-changing time either expressly or implicitly in their CBAs. These companies have done so in reliance upon Section 203(o) of the FLSA, 29 U.S.C. § 203(o), that reserves to unions and employers the right to negotiate and define in CBAs or through established custom and practice thereunder whether represented workers' clothes-changing time is compensable under the FLSA. The Seventh Circuit's decision challenged here, along with earlier decisions of the Fourth, Fifth, Sixth, Tenth and Eleventh Circuits, confirm the validity of long-established CBA provisions and practices of *Amici* members and their union-represented workers with respect to clothes-changing time.

If the Seventh Circuit's decision is overturned, employers and their workers would be deprived of the benefits struck through collective bargaining on this issue. A reversal would ignore Congress' express intent in Section 203(o) to reserve the issue of FLSA compensability for clothes-changing time to collective bargaining for represented workers. The uncertainty, confusion and undesirable policy that would ensue would adversely affect *Amici* members and their represented workers by destroying the carefully-crafted compromises and long-established practices on compensability of clothes-changing time that have been achieved through the collective bargaining process. Such a result would increase the ongoing deluge of

FLSA collective action lawsuits seeking undeserved multi-million dollar backpay awards and deny *Amici* members and the unions representing their workers the opportunity to freely negotiate such compromises in the future. If not checked, such interference with the collective bargaining process will continue to grow. The Court should prevent such disruption by affirming the decision below in full.

SUMMARY OF ARGUMENT

The decision below affirms the long-established customs, practices, and expressly bargained-for CBA provisions of *Amici* members and their employees. That result is fully in accord with the expressed intent of Congress in passing Section 203(o) that deference be given to the collective bargaining process. If the decision below is reversed, the rights of *Amici* members and their represented workers to bargain and reach agreement on clothes-changing time would be adversely affected.

The primary purpose of Congress in enacting the National Labor Relations Act ("NLRA") was to promote stability in labor relations and reduce the deleterious effects of unregulated combat between unions and employers. The 1947 Labor Management Relations Act ("LMRA") amendments to the NLRA demonstrated Congress' commitment to a uniform national labor policy promoting and encouraging the process of the peaceful resolution of labor disputes through collective bargaining, as this Court repeatedly

has recognized. 29 U.S.C. § 141 *et seq.* *See also, e.g.*, *Schneider Moving & Storage Co., v. Robbins*, 466 U.S. 364, 371-72 (1984); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Following controversy and uncertainty over the impact of the FLSA on the negotiation of clothes-changing time by union-represented employers, Congress enacted Section 203(o) in 1949 to clarify its position and protect the outcome of collective bargaining. That enactment was clearly intended to reflect a "hands-off" policy under the FLSA when employers and their represented workers negotiate questions of compensability for clothes-changing time either expressly or through established customs and past practices.

The language, placement, and legislative history of Section 203(o) clearly show that the term "clothes" should be construed broadly to encompass all items of work apparel, including personal protective equipment. That conclusion is underscored by both the current interpretation and understanding of the term "clothes" to include personal protective equipment as well as the interpretation and understanding of that term contemporaneous with the enactment of Section 203(o).

Amicus AFL-CIO's contention that Congress intended to adopt a narrow interpretation of "changing clothes" pursuant to unrelated decisions of the War

Labor Board is entirely unfounded. Rather, the intent of Congress was that "changing clothes" be interpreted broadly in conjunction with the commonly used meaning of that phrase in the context of the workplace.

The Court, consistent with the national labor policy favoring collective bargaining, should defer to agreements and established past practices reached by the parties over what is and what is not compensable clothes-changing time. Allowing the give-and-take of collective bargaining to work in this context benefits all parties. In upholding the decision below, the Court should adopt a bright line test recognizing that "clothes" includes any and all parts of the work outfit, including personal protective equipment, worn by employees and used in the workplace.

For all these reasons, the Court should affirm the decision below of the Seventh Circuit Court of Appeal, and the interpretation of Section 203(o) articulated by the Seventh Circuit and followed by at least five other Circuits.

ARGUMENT

I. The Express Language, Legislative History and Context of Section 203(o) Demonstrate That Congress Intended to Defer to the Collective Bargaining Process With Respect to Time Spent Changing Clothes

Passed in 1938, the FLSA requires that employees be paid overtime compensation for "hours worked" in excess of 40 per week at a rate not less than one and one-half times the regular rate at which they are employed. 29 U.S.C. § 207(a)(1). Unfortunately, the FLSA does not define the term "hours worked," and conflicts soon arose between employers and employees with respect to what activities required compensation. In interpreting those terms, this Court initially adopted a broad definition in its early FLSA cases. *E.g.*, *Tennessee Coal Corp. v. Muscoda Local No. 123*, 321 U.S. 590 (1944); *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 161 (1945); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946).

In *Anderson*, employees at a pottery factory were required to walk the length of the facility before performing preliminary activities such as donning aprons and overalls, taping their arms, putting on finger cots, and preparing equipment for the work day. *Anderson*, 328 U.S. at 683. The Court held the workers' preliminary time compensable because the workweek included "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson*, 328 U.S. at 690-91 (1946). As a result of

Anderson, time spent performing preliminary activities such as donning work clothing was counted as hours worked. *Id.* at 692-93.

Reacting to *Anderson*'s broad interpretation of the FLSA, and to the subsequent flood of FLSA suits in the wake of that case, Congress passed the Portal-to-Portal Act in 1947. In doing so, Congress stated that the Courts had interpreted the FLSA "in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C § 251(a). As a result, Congress provided that employers would not be required to pay employees for activities which are preliminary or postliminary to principal activities. 29 U.S.C. § 254(a)(2).

Two years later, reacting to broad Department of Labor ("DOL") interpretations of the FLSA that donning special clothing might be a principal activity, Congress again amended the FLSA by adding Section 203(o) to clarify that it intended to allow employers and unions representing their workers to resolve through collective bargaining whether the compensable work day includes time spent "changing clothes."

The text of Section 203(o) explicitly declares Congress' intent that deference be given to the collective

bargaining process with respect to clothes changing at work:

> As used in this Chapter –
>
> (o) Hours Worked. – In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee. 29 U.S.C. § 203(o).

Congress' use of the phrase "shall be excluded" demonstrates the intent that the issue of "changing clothes" at the beginning and end of the work day not be subject to limitation or override by courts. *E.g.*, *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) ("shall" is ordinarily "the language of command") (citation omitted). Specifically, with regard to time spent donning and doffing work outfits, the amendment was intended to allow unions and employers to "define exactly what is to constitute a working day and what is not to constitute a working day." *Id.* Congress' forceful command that collective bargaining agreements and customs as to clothes-changing compensation were to be left undisturbed by the Courts indicated just such an intent. That is exactly what the Seventh Circuit decided here.

Congress' purpose in adding Section 203(o) was clear. Section 203(o) was intended to "avoid [] another series of incidents which led to the Portal-to-Portal legislation" and **"to give sanctity once again to the collective bargaining agreements."** 95 Cong. Rec. 11433 (1949) (emphasis added). That intent is entitled to substantial weight in interpreting Section 203(o). *See Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 546 (1976) (holding that "a statement of one of [a statute's] sponsors . . . deserves to be accorded substantial weight in interpreting th[at] statute"). Congressman Herter was also explicit that 203(o) was to allow collective bargaining to "define exactly what is to constitute a working day and what is not to constitute a working day." Thus, the goal of Congress was to allow unions and employers to remove these activities from the work day so that the work day would start only after employees had put on their work gear and were *ready to work*. Defining clothes to exclude items that had to be worn to be ready to work would therefore frustrate Congress' purpose.

As enacted, Section 203(o) was intended to defer to the collective bargaining process in determining whether compensation is paid, or not, for time spent by union-represented employees in changing the types of clothes involved in cases such as *Anderson*. The language and intent of Section 203(o) is "thoroughly reflective of that purpose" as it clearly shows that the intent of Congress was to give private parties latitude to define the outer contours of the work day,

especially where specific measurements are administratively difficult. *See Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 217-18 (4th Cir. 2009). Accordingly, the legislative history of Section 203(o) demonstrates, consistent with the plain language of the statute, a clearly defined intent to defer to the private collective bargaining process with respect to the definition and compensability of clothes-changing time in the workplace.

Congress also recognized that employers and unions are in a far better position than legislatures or the Courts to "thresh out" how many minutes of time should be allocated to compensable time. *See* 95 Cong. Rec. 11210 (1949) (comments of Rep. Herter). This is, of course, quite logical since employers and unions are in a far better position than are courts or the DOL to tailor specific solutions to particular factual circumstances, such as plant layout and the types of clothing worn in the industry, and to modify those solutions to fit the ever-evolving workplace. This is precisely what has happened to *Amici's* members, which have modified and improved protective clothing as new materials, such as Kevlar, have become available. Such changes have often been accompanied by bargaining and have been agreed-upon with employee representatives.

Section 203(o) demonstrates the preference of Congress for private resolution of clothes-changing time by the parties over the certain morass that would ensue should the determination be left to a "one-size fits all" or even a "one-size-fits-none" approach should it be left to the courts or politically

motivated, ever-shifting administrative interpretations. That preference allows the parties to reach a suitable compromise where, for example, a union might trade compensation for clothes changing in return for higher wages, benefits, or better working conditions. An employer might offer those enhancements, or as is often the case a specified amount of pay to cover clothes changing, in lieu of taking the administratively difficult task of measuring the small amounts of time employees engage in clothes changing, especially since that time often differs from employee to employee and day to day.

The Fourth, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits have relied upon Section 203(o)'s language and legislative history to support holdings that the purpose of this statutory provision is to leave the issue of payment for time spent "changing clothes and washing" to the collective bargaining process. Employers in those circuits have, in turn, relied on the court's rulings and rationales in tailoring their compensation policies and negotiating their collective bargaining agreements, as have employee representatives. *See Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 217-18 (4th Cir. 2009), cert. denied, No. 09-1529, 2010 WL 2420333 (Oct. 4, 2010); *Allen v. McWane, Inc.*, 593 F.3d 449, 458-59 (5th Cir. 2010); *Franklin v. Kellogg Co.*, 619 F.3d 604 (6th Cir. 2010); *Spoerle v. Kraft Foods Global, Inc.*, 614 F.3d 427, 428 (7th Cir. 2010) (adopting the rationale of *Sepulveda, supra*); *Anderson v. Cagle's Inc.*, 488 F.3d 945, 958

(11th Cir. 2007); *see also Salazar v. Butterball, LLC*, 644 F.3d 1130 (10th Cir. 2011) (reaching the same result without resort to an analysis of Section 203(o)'s legislative history).

II. Section 203(o) Should Be Broadly Interpreted to Include Protective Clothing

A. The Language, Legislative History and Common Understanding of Workplace "Clothes" All Encompass Protective Clothing.

The statute defers to bargaining whether "changing clothes" will be compensable. "The plain meaning of legislation should be conclusive . . . " *E.g.*, *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989). Here, the plain meaning of Section 203(o) conclusively demonstrates that "clothes" includes personal protective equipment. As courts have noted, dictionaries at the time defined (and still define) 'clothes' as 'clothing' which is to say that it is "covering for the human body or garments in general: all the garments and accessories worn by a person at one time." *See, e.g.*, *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 214-15 (4th Cir. 2009) (quoting *Webster's Third New International Dictionary* (unabridged)); *see also Cambridge Dictionary of American English* (defining "equipment" as "the set of tools, **clothing**, etc., needed for a particular activity or purpose") (emphasis added); *Webster's Third* (listing "outfit" as synonym of "equipment"); *The American College Dictionary* 406 (1949) (defining "equipage" as "outfit,

as of a ship, an army, or a soldier"); *Shorter Oxford*, 1939 at 627 (defining "equipment" as "Anything used in equipping; furniture, outfit, warlike apparatus; necessities for travelling, etc."). Accordingly, the plain meaning of "clothes" is broad, and it clearly applies to protective equipment that is worn as a covering for the human body, and which already was in wide use in the workplace at the time the law was passed.

Congress was patently referring to work clothes in Section 203(o) rather than to non-work clothes. Thus, there is no logical reason to limit the definition of that term to "ordinary" non-work clothes, as suggested by Petitioner in this case. Instead, it is most logical to interpret "clothes" in the text of the statute regulating the workplace, as all coverings for the human body or garments in general which are worn for work. *See Franklin v. Kellogg, Co.*, 619 F.3d 604, 614 (6th Cir. 2010); *Sepulveda*, 591 F.3d at 215.

If the term "clothes" in Section 203(o) is interpreted to exclude any garment or item that serves a protective function, that section would be rendered meaningless and unnecessary. When Congress enacted Section 203(o) in 1949, changing into and out of street clothing at the beginning and end of the workday already was not compensable under the Portal-to-Portal Act as a preliminary or postliminary activity. Therefore, there would have been no need to protect collective bargaining on clothes changing through the deference mechanism of Section 203(o), as street clothes changing would never be an issue.

The legislative history further confirms that Section 203(o) was enacted in reaction to Portal-to-Portal interpretations of the DOL suggesting that the donning and doffing of specialized and essential clothes could be a principal activity and, therefore, compensable.

Giving a broad interpretation to the meaning of "clothes" in Section 203(o) that includes garments and other items that serve a protective function is fully consistent with *Steiner v. Mitchell*, 350 U.S. 247 (1956). In holding that the donning and doffing of special clothing worn by employees in a battery plant was integral and indispensable to their principal activities, and therefore compensable, the Court relied upon and cited to the legislative history of the Portal-to-Portal Act, in particular the colloquy between Senators McGrath and Cooper, to distinguish between the donning and doffing of ordinary clothing in the workplace, which would not be compensable, since it is a mere convenience to the employee, and the donning and doffing of special clothing, which would be compensable if it is integral and indispensable to the employees' principal activities. *See Steiner v. Mitchell*, *id.* (Appendix). Certainly, the donning and doffing of protective clothing and equipment such as that involved in this case, would otherwise be compensable, **but for** the application of Section 203(o). Yet, under the interpretation of "clothes" espoused by the Petitioner in this case, Section 203(o) would be rendered meaningless, because the donning and doffing of

ordinary non-protective clothing is not in any event compensable under the Portal-to-Portal Act.

While the personal protective equipment at issue here is meant to provide protection for the worker's body from workplace hazards particular to the Respondent's industry, there is simply no logical reason to distinguish that equipment from any other type of clothing that provides protection from the elements or from more general workplace hazards such as heat, cold, common abrasions in a manufacturing environment, for the kind of conditions commonly found in the *Amici's* industries.

As discussed above, a broad interpretation of Section 203(o) is the most logical one because that section was enacted to rein in interpretations of the FLSA that resulted in unforeseen liability for compensable time, particularly that involving the donning and doffing of specialized work clothing in manufacturing settings like that addressed in *Anderson*. That case, moreover, addressed protective items much like those in this case, and if Congress intended to address in Section 203(o) the same type of protective clothing at issue in *Anderson*, which it did, then Section 203(o) must be interpreted to address that same type of protective clothing and equipment.

B. Both Contemporaneous and Later Administrative Interpretations Have Construed "Clothes" to Include Protective Gear.

The broad interpretation of the word "clothes" discussed above is consistent not only with the plain meaning of that term and its common contemporary workplace meaning, it is also consistent with the common usage of "clothes" in the workplace at the time Section 203(o) was enacted. For example, in its Handbook of Labor Statistics issued in 1936, the DOL stated that "**protective clothing** in good condition shall be furnished to workers exposed to injury hazards from physical contact with materials, such as goggles . . . , safety hats or helmets, and safety shoes . . . , fire-resisting leggings . . . , leather or asbestos aprons . . . , [and] gloves for protection against sharp edges, splinters or electric shocks, etc." United States Department of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics, Issue 616, pp.309-11 (1936) (emphasis added). Thus, as early as 1936 the DOL recognized that "clothing" within the plain meaning of that term and in the context of the workplace included specialized protective garments not unlike the types worn in this case and by *Amici* members' workers in the meatpacking industry (e.g., aprons, gloves, safety helmets and shoes).

The DOL's 1941 Handbook of Labor Statistics was also consistent with the common usage of "clothes" to include specialized protective items. In particular, that publication included "safety hats, gloves, special

safety shoes, leggings, spats, and aprons" as well as "a special foot protector for girls, covering the ankle and tip of the foot" and goggles in its description of "Practical Work Clothing for Women to Prevent Injury." United States Department of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics, Vol. 1, p.525 (1941). It could hardly be clearer that the DOL itself included specialized protective gear within its commonly-used definition of "clothes" with respect to garments worn in the workplace just a few years prior to the enactment of Section 203(o).

In that respect the DOL was certainly not alone. The term "clothes" was commonly used in the manufacturing industry to describe protective garments worn in the workplace at the same time that Congress drafted and passed Section 203(o). Various other publications issued both prior to and contemporaneous with the adoption of Section 203(o) demonstrate that "clothes" included specialized protective gear in the common lexicon of the time. *E.g.*, R.M. Little, *Protective Clothing for Men*, Safety Fundamentals 32 (1919) ("We wear clothing for two principal reasons: First, for protection and, second, for comfort and appearance. Man first wore clothes to protect himself from the thorns of the jungle."; "The use of special protective clothing in industry is increasing"; describing "asbestos gloves or mitts"; "a heavy gauntlet rubber glove"; "heavy helmets . . . to protect the head from the force of blows"; picturing various "asbestos garments" including leggings and forearm guards; "'Protect-toe' shoes" or other boots with "[r]einforced,

boxed toes [to] prevent toe accidents"; heat resistant leggings made of "chrome leather [or] asbestos"; "leather aprons"; "safety belts"; "a protective mask should be worn by iron and cinder men" that is "made of wire cloth with adjustable cloth cap, and a full fireproof apron [*i.e.*, a hood] extending over the chest and protecting the neck. The eyes of the wearer are safeguarded by strong, clear optical glass"); J.J. Lamb, *What is Safe Clothing for Factory Workers*, National Safety News, Vol. 3, No. 10, pp.5-6 (Mar. 7, 1921) (describing "easily removable leggings" that can "resist heat and prevent hot substances or acids from reaching the flesh"; "safe shoes, including some with steel or aluminum soles"; "special stockings of non-conductive material"; "leggings [which] are recognized as necessary parts of sage clothing" and "should be made of canvas, asbestos, or chrome leather"; "canvas leggings should be treated so as to make them fire-proof"; aprons made of "leather asbestos, or other fireproof material"; "helmets"; "heavy leather or canvas gloves reinforced with steel ribbons"; "asbestos gloves or mittens").

A broad interpretation of "clothes" in Section 203(o) to encompass protective clothing is also consistent with the DOL's own usage of that term in analogous circumstances. Indeed, in 29 C.F.R. § 1910.1030(b), the Occupational Safety & Health Administration, a branch of the DOL, defines personal protective equipment as "specialized **clothing** or equipment worn by an employee for protection against a hazard." (emphasis added). What is more, that same section

explicitly indicates that its definition of personal protective equipment is not intended to include general work clothes (e.g., uniforms, pants, shirts or blouses) not intended to function as protection against a hazard. Thus, the DOL has firmly stated that "clothing" includes far more than the simple ordinary clothing urged by Petitioner, but also the type of personal protective equipment that serves as protection from workplace hazards.

OSHA's information booklet on Personal Protective Equipment also repeatedly refers to protective equipment as clothing, and states that "Protective clothing comes in a variety of materials, each effective against particular hazards." The DOL's booklet on Personal Protective Equipment goes on to list as personal protective equipment protective clothing made of paper-like fiber; treated wool and cotton; duck (closely woven cotton that protects against cuts and bruises); leather, and rubber, rubberized fabrics, neoprene, and plastics. Thus, the personal protective equipment worn in this case, and that worn in the meat packing and poultry industries, which is made of cotton, rubber, neoprene, and often plastic, and is designed and implemented specifically to protect workers from hazards particular to their wearers' industries, is clothing within the plain meaning of that word **and** within the common workplace usage of that word as well.

The DOL adopted this same view in its 2002 and 2007 Opinion Letters. In 2002, the DOL reexamined the text and legislative history of Section 203(o) and

concluded that it was intended to apply to the donning and doffing of the personal protective equipment used in the meat packing industry. Wage and Hour Div., U.S. Dept. of Labor, Opinion Letter, 2002 WL 33941766 (June 6, 2002). In particular, the DOL found that it was "reasonable to assume that when Congress enacted § 203(o), it had in mind the kind of protective clothing at issue in the *Mt. Clemens* case just three years earlier, which involved aprons and overalls, shirts and finger sheaths." *Id.* Following that reasoning, the DOL concluded that the term "clothes" was intended to encompass work clothing that was worn for "covering, protection, or sanitation". *Id.* In 2007, the DOL once again thoroughly analyzed the issue and reiterated its position that "clothes," as used in Section 203(o), included "heavy protective safety equipment worn in the meat packing industry such as meat aprons, sleeves and gloves, plastic belly guards, arm guards, and shin guards." Wage and Hour Div., U.S. Dept. of Labor, Opinion Letter, 2007 WL 2066454 (May 14, 2007).[2]

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[2] Although the DOL's conflicting opinion letters interpreting Section 203(o) issued in 1997, 2001, 2002, 2007 and 2010 are not entitled to significant deference by the Court under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), *Amici* believe the DOL correctly interpreted the meaning of "clothes" under Section 203(o) in its 2002 and 2007 opinion letters.

C. The Placement Of Section 203(o) In the Statute Excludes Bargained-For Clothes-Changing Time From Being Compensable.

Contrary to the clear Congressional intent, Petitioner seeks an unduly narrow reading of "changing clothes" as applied in Section 203(o). Therefore, it is not surprising that Petitioner seeks to treat Section 203(o) as an *exemption*, rather than an *exclusion* from FLSA because, as this Court has admonished, exemptions from the FLSA must be construed narrowly. *See, e.g., Arnold v. Ben Kanowski, Inc.*, 361 U.S. 388, 392 (1960). However, Petitioner's interpretation is not supported by either the text or structure of the FLSA. Indeed, the text and structure of Section 203(o) and the FLSA demonstrate that Section 203(o) is *an exclusion*, which should be interpreted more broadly to give full effect to the intent of Congress.

FLSA Section 213, entitled "Exemptions," exempts certain classes of employees from various requirements of the FLSA. The exemptions found in Section 213 operate to deny FLSA coverage to specific categories of employees, and are treated by the courts as affirmative defenses with the burden of proof resting with the employer.

Unlike exemptions from coverage, Section 203(o) is found in the separate "Definitions" section of the Act. As part of that section, Section 203(o) is an explicit modification of hours worked that excludes from

compensability clothes-changing time if that is the result of collective bargaining. *See* 29 U.S.C. § 203(o).

If Congress had wished to bestow upon Section 203(o) the same status as the exemptions set forth in Section 213, it easily could have amended Section 213 instead of Section 203 when it added Section 203(o). However, it is quite clear that Congress fully understood the distinction between an FLSA definition and an FLSA exemption at the time it enacted Section 203(o). At the same time it included Section 203(o) in the "Definitions" section of the FLSA in the 1949 amendments, Congress also amended Section 213(a)(2) of the FLSA to exclude "any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located." 29 U.S.C.A. § 213(a)(2). *See Burden v. SelectQuote Ins. Services*, 848 F. Supp.2d 1075, fn. 6 (N.D. Cal. 2012). This irrefutably demonstrates that at the time it enacted Section 203(o), Congress knew and fully understood the importance of the distinction between FLSA exclusions and exemptions.

III. There Is No Evidence to Support the Argument That Congress Intended to Adopt the Treatment Given By the War Labor Board to Clothes-Changing Practices

Amicus AFL-CIO offers the strained argument that Congress intended in Section 203(o) to adopt the

War Labor Board's usage of the term "clothes" which, allegedly, would exclude protective equipment. That argument is flawed for one inescapably fatal reason: there is no evidence whatsoever that Congress had any intention to adopt a narrow interpretation of the term "clothes" in line with anything the War Labor Board had determined and, as noted above, all evidence directs the opposite conclusion.

In fact, the AFL-CIO points to no reference at all in either the text or the legislative history of the FLSA in general or Section 203(o) in particular that leads to its erroneous conclusion. As discussed above, the text of 203(o) refers only to "clothes," leading to the conclusion that Congress intended the common meaning of that term with respect to clothes worn in the workplace. As demonstrated in the preceding sections, that common meaning, both now as well as at the point in time that Congress wrote 203(o), included protective equipment. Moreover, if Congress had intended the term "clothes" in Section 203(o) to refer only to street clothing, as the AFL-CIO contends, there would have been no need to enact the provision at all, because changing into and out of ordinary clothing in the workplace had already been rendered non-compensable by the Portal-to-Portal Act.

Contrary to the AFL-CIO assertions, in 1949 Congress did evince the very specific intent to "avoid [ ] another series of incidents which led to the Portal-to-Portal legislation" and **"to give sanctity once again to the collective bargaining agreements,"**

an intent that leads to the inescapable conclusion that Section 203(o) was and is intended to allow employers and employees to determine, based on the particular working conditions and circumstances at issue, whether to include compensation for donning and doffing or protective equipment, because such equipment is plainly included within the meaning of "clothing." *See* 95 Cong. Rec. 11210 (1949) (Statement of Rep. Herter).

IV. Allowing the Issue of Clothes-Changing Time to Be Determined By the Collective Bargaining Process Furthers All Parties' Interests

For decades *Amici* members, and the unions representing their employees, have relied upon the specific provisions of Section 203(o), along with recent court decisions interpreting Section 203(o) to address clothes-changing time through the collective bargaining process. Such reliance can hardly be misplaced, given the language of Section 203(o), and the legislative history demonstrating Congress' intent to protect and restore the sanctity of the collective bargaining process. Many *Amici* member-employers, through collective bargaining, have agreed to extend benefits to represented workers in exchange for removal or limitation of compensability for clothes-changing time, and have memorialized those agreements in their CBAs.

Moreover, although the protective clothing and equipment worn by employees in the meatpacking

and poultry industries have gone through relatively dramatic changes and improvements over the years, some of which were mandated by OSHA and others voluntarily implemented by employers, the fact of the matter is that even in the mid-1940s, prior to the enactment of Section 203(o), meatpacking employees were required by governmental regulations to wear special garments for safety and sanitary reasons, including smocks, overalls, frocks, uniforms, boots, rubbers, leather aprons, raincoats and gloves. *See In re Swift & Company, Armour & Company, Wilson & Company and Cudahy Packing Company*, 21 War Labor Reports 652, 673 (1945). These and similar types of protective items that were in existence at the time Section 203(o) was enacted, as well as the more sophisticated items of protective gear, including kevlar and metal mesh that later evolved in the industry, are precisely the types of specialized protective items that Congress intended to defer to the collective bargaining process when it enacted Section 203(o). Indeed, throughout the entire time frame of such gear changes, many *Amici* members engaged in bargaining over the impact and compensability of those changes.

The instant case presents facts demonstrating just such an explicit trade between Respondent and its represented workers. This trade was expressly memorialized in CBAs which conferred extra benefits on employees through negotiations, in exchange for elimination of claims for clothes-changing time compensation. Respondent's Brief at 11-12. The reasons

for such an exchange by an employer are obvious and are shared by *Amici* members: the relatively small amount of time spent changing clothes imposes a disproportionate administrative burden on employers to account and pay for such time as compensable time. Employers are thus willing to confer, through negotiations and past practices, additional benefits in exchange for relief from that administrative burden. Employees are willing to forego this minimal pay in return for more certain and substantial benefits, as happened here and as has happened with *Amici* members.

A decision to reverse the Seventh Circuit would upend the decades of negotiations and practices as to clothes-changing time established at many *Amici* members, as well as at organized employers in other industries. This can only result in strained labor-management relations, renewed bargaining, possible labor strife, and most likely, a new deluge of private lawsuits seeking to overturn the bargains made between employers and employee representatives. Such a result, is bad for the economy, employers and employees, and helps only private counsel seeking to bring class action lawsuits to overturn mutually-agreed bargains reached between employees, their unions and employees. Such disruptions should not be countenanced by the Court.

V. The Court Should Adopt A Bright Line Test to Define the Meaning Of Clothes Changing Under Section 203(o)

In articulating a standard for determining what is and what is not "clothes changing," within the meaning of Section 203(o), the Court in deference to the collective bargaining process, at a minimum should allow the parties themselves to agree on what items of protective clothing and equipment should be included in or excluded from compensable time. Consistent with the overriding purpose of Section 203(o), the DOL and courts should defer to those collectively bargained or clearly defined custom and practice compensation arrangements.

The Court further should announce a bright line, common sense test which clearly states that the definition of "clothes" under Section 203(o) includes garments, attire, gear and other items that serve a protective or safety function. Absent clarification of what is and what is not encompassed within the parameters of clothes changing under Section 203(o), *Amici* and employers in other industries where protective clothing is utilized will continue to face uncertainty and ongoing, expensive collective action litigation over whether particular individual items of protective equipment and gear fall within the definition of "clothes" under Section 203(o). Hopefully, the test articulated by the Court will avoid this undesirable result and stem the tide of future litigation over this issue.

CONCLUSION

Unlike Justice Stewart's difficulty in being able to define what is and what is not pornography, there is a clear and commonly understood definition of the term "clothes changing" under FLSA Section 203(o) that applies in the workplace setting. That definition without question includes not only garments, but other items and equipment that are worn by workers for purposes of protection, safety, health or sanitation. All Circuits except the Ninth that have addressed this issue have reached that conclusion and employers in those Circuits have relied upon those decisions. For the reasons stated above as well as those expressed in Respondent's main brief and other *Amici* supporting briefs, the Court should put this issue to rest and affirm in full the decision of the Seventh Circuit.

Dated: July 26, 2013

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AMICUS CURIAE BRIEF

No. 12-417

IN THE

Supreme Court of the United States

CLIFTON SANDIFER, *et al.*,

Petitioners,

v.

UNITED STATES STEEL CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

This *amicus curiae* brief is being filed on behalf of the Chamber of Commerce of the United States of America (the "Chamber").[1] The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size and from every industry sector and region of the country. The Chamber advocates for the interests of the business community in courts across the nation, in part by filing *amicus curiae* briefs in cases raising issues of national concern to its members.

The Chamber's members are subject to federal, state, and local laws respecting the wages paid to and hours worked by their employees. These laws serve the needs of employers and employees alike when the rules that govern their application are clearly prescribed and easily understood. In 2012, a record number of Fair Labor Standards Act ("FLSA") lawsuits were filed in federal court. Many of these cases were caused by unnecessary ambiguity in regard to how the FLSA's terms fit a particular business context.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The Chamber's members have a significant interest in the interpretation of 29 U.S.C. § 203(o). In enacting § 203(o), Congress authorized an employer and its employees to tailor the application of the FLSA's rules to their specific context through collective bargaining in order to resolve the issue of when time spent changing clothes and washing at the beginning and end of a workday should be treated as compensatory time. That congressional judgment should be honored and the results of the trade-offs made at the bargaining table respected. When a collective agreement has been reached under the terms of the FLSA and applicable labor laws, employees—having previously obtained the benefits of the collective bargain—may not subsequently bring a class action suit to relitigate what was settled at the bargaining table.

The Chamber's members also have a strong interest in ensuring that courts do not improperly defer to an agency's informal statutory interpretations that are substantively and procedurally unsound. Here, the Department of Labor ("Department" or "DOL") properly construed § 203(o) to allow collective bargaining regarding the time it takes to put on and take off protective clothing. The contrary position more recently taken by the agency is unsound, was not promulgated through notice-and-comment rulemaking, and brings no agency expertise to bear. No deference is owed in this context.

SUMMARY OF ARGUMENT

This Court previously issued a series of decisions that read the wage and hour laws

expansively and provided no role for collective bargaining regarding such matters. Congress responded by making clear that in regard to certain wage and hour issues collective bargaining can play a proper and important role.

At issue in this case is § 203(o) of the Fair Labor Standards Act. In enacting that statute, Congress provided that the employees and their employers may collectively bargain to determine when and whether the time spent changing clothes and washing at the beginning and end of each workday should be deemed compensable work time under the FLSA. That is exactly what the employees and U.S. Steel did in this case. Petitioners, a group of those employees, now seek to undo that deal by arguing that protective clothing should not be considered clothing at all for the purposes of this statute. Petitioners posit that § 203(o) is an exemption from the wage and hour laws favoring employers and must, therefore, be narrowly construed. The Seventh Circuit, in an opinion by Judge Posner, properly and thoroughly rejected that argument, recognizing that § 203(o) is not an exemption from the FLSA, that protective clothing plainly constitutes "changing clothes" within the meaning of the statute, and that there was no basis for adopting a narrow construction of the term.

Petitioners' argument that § 203(o) should be narrowly construed because the statute purportedly favors employers is completely misguided. The goal of § 203(o) is "to give sanctity once again to the collective-bargaining agreements." 95 Cong. Rec. 11,210 (1949). This statutory provision is not one favoring the employer, but one empowering the

union to engage in collective bargaining, at its discretion, on the time spent changing clothes and/or washing at the beginning and end of the work day. Congress recognized that, as to issues regarding changing and washing at the start and end of the workday, the employees should be able to act collectively and bargain with their employer. It was Congress' considered judgment that where the employees decide to engage in such collective bargaining and can strike a deal, it would best serve all involved to respect the deal. Congress understood that, as to such matters, employees and employers, working together, are best situated to tailor an optimal solution to their specific employment environment.

The cases suggesting that exemptions in the FLSA should be narrowly construed also do not apply because § 203(o) is a definitional provision that sets limits on the Act, not an exemption from the Act. In *Christopher v. SmithKline Beecham Corp.*, this Court made clear that those cases have no application where the relevant term is a "general definition that applies throughout the FLSA." 132 S. Ct. 2156, 2172 (2012). Section 203(o) is such a term. It offers a definition of "hours worked" to calculate "hours" under the FLSA's minimum wage and overtime provisions. As the Fifth, Sixth, Seventh, Tenth, Eleventh, and Federal Circuits have each correctly reasoned, § 203(o) is not an exemption from the FLSA at all. Consistent with *Christopher*, this Court should reject Petitioners' argument that § 203(o) should be narrowly construed.

For all these reasons, the cases speaking to a narrow construction of FLSA exemptions favoring

employers have no application here. In any event, this "anti-employer" rule of construction is ill-conceived. The plain, natural meaning of the term "clothes" includes all forms of clothing, including protective clothing. There is no basis for a canon of construction that requires courts to disregard the natural meaning of the words enacted by Congress simply because the terms might be applied in a way that could favor employers.

Finally, no deference is due to the Department of Labor's interpretation of § 203(o). Contradicting prior opinion letters, the Department's most recent interpretation took the novel form of an "Administrator Interpretation" that was designed to provide general guidance rather than respond to any particular factual context. The Department's interpretation fails to adhere to administrative procedures and lacks any "force of law." Furthermore, the agency's interpretation brings no expertise to bear and is unsound. Thus, it does not warrant any judicial deference.

ARGUMENT

I. SECTION 203(o) SHOULD BE CONSTRUED REASONABLY, NOT NARROWLY.

"In the past," this Court has stated that "exemptions to the FLSA must be 'narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit.'" *Christopher*, 132 S. Ct. at 2172 (alteration in original) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)); *see also Mitchell v. Ky. Fin.*

Co., 359 U.S. 290, 295 (1959) (citing cases). Petitioners erroneously rely on these cases to argue that protective clothing does not fall within the scope of 29 U.S.C. § 203(o), which grants employees the right to bargain collectively over whether time spent changing clothes and washing at the beginning and end of the workday will count as compensable time.[2] *See Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005).

These cases cannot properly be applied to § 203(o). Indeed, the Court of Appeals here and all other courts of appeals that have addressed the issue except for the Ninth Circuit have rejected or criticized Petitioners' unnatural and unduly narrow construction of § 203(o).[3]

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[2] Section 203(o) provides:

> In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

29 U.S.C. § 203(o).

[3] *See* Pet. App. 9a ("[S]ection 203(o) does not create an exemption."); *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1138 (10th Cir. 2011) ("[T]he Ninth Circuit assumed, without analysis, that § 203(o) is an exemption and must be read narrowly."); *Franklin v. Kellogg Co.*, 619 F.3d 604, 612 (6th Cir. 2010) ("The reasons set forth by the majority of our sister circuits for interpreting § 203(o) . . . as an exclusion [rather than an exemption] from the definition of work, placing the burden on the plaintiff, are persuasive."); *Allen v. McWane*,

The notion that exemptions from the FLSA should be narrowly construed was founded on a desire to enforce the terms of the Act in a manner that fulfills its mission of protecting workers' wage and hour rights:

> The Fair Labor Standards Act was designed "to extend the frontiers of social progress" by "insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress.

A. H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945) (citation omitted) (quoting Message of the President to Congress, May 24, 1934).

Section 203(o), however, is not an exemption from the FLSA favoring employers to the detriment

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Inc., 593 F.3d 449, 458 (5th Cir. 2010) ("[T]he Eleventh Circuit persuasively critiqued the Ninth Circuit's characterization of § 203(o) as an exemption."); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 957 (11th Cir. 2007) ("[W]e conclude that § 203(o) is not an exemption under the FLSA but is instead a definition that limits the scope of the FLSA's key minimum wage and maximum hour provisions."); *cf. Sepulveda v. Allen Family Foods*, Inc., 591 F.3d 209, 214 n.1 (4th Cir. 2009) (questioning the applicability of the narrow construction canon to § 203(o)); *Adams v. United States*, 471 F.3d 1321, 1325–26 (Fed. Cir. 2006) (observing that the Portal-to-Portal Act does not create an exemption from the FLSA on the grounds that it deals with the exclusion of certain activities from the FLSA rather than the exempt status of workers).

of the wage and hour rights of employees. Rather, it is a provision born of an era in which Congress viewed collective bargaining as an important right for protecting employees and creating an atmosphere of labor harmony. Section 203(o) empowers employees and their employer to bargain and to agree as to how the time spent washing and changing clothing at the start and end of the workday will be treated under the wage and hour laws. Permitting employees to bargain collectively for solutions that make sense in their particular contexts does not derogate from the FLSA rights of employees. Therefore, none of the concerns that might call for a narrower construction applies here. In any event, the so-called canon of narrow construction in the FLSA context is unsound and should be rejected.

A. Section 203(o) Empowers Employees To Bargain Collectively.

Section 203(o) arose from an era in which Congress was actively embracing a national policy favoring collective bargaining. In enacting the National Labor Relations Act ("NLRA") of 1935, 29 U.S.C. § 151 *et seq.*, and the Labor Management Relations Act of 1947, 29 U.S.C. § 141 *et seq.*, Congress empowered employees to act and bargain collectively. The policy reflected in these labor laws was that "by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working

conditions." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

In 1947, and then two years later in 1949, Congress enacted legislation to ensure that the nation's wage and hour laws were not construed in a manner that unduly diminished the right of employees to bargain collectively. This Court had issued a series of rulings in 1945 and 1946 holding "that congressionally granted [FLSA] rights take precedence over conflicting provisions in a collectively bargained compensation arrangement." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740–41 (1981) (citing *Martino v. Mich. Window Cleaning Co.*, 327 U.S. 173, 177–78 (1946); *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 430–32 (1945); *Jewell Ridge Coal Corp. v. Mine Workers*, 325 U.S. 161, 166–67, 170 (1945)). Congress immediately responded to those rulings and took unambiguous steps to restore a limited role for collective bargaining in the application of the FLSA's wage and hour laws.

In enacting the Portal-to-Portal Act in 1947 as an "emergency" response, *Steiner v. Mitchell*, 350 U.S. 247, 253 (1956), Congress had two primary goals. First, Congress sought to cure the unfair retroactive effects of the Court's FLSA rulings. *Id.* at 253–54; 29 U.S.C. § 251(a). Second, Congress acted prospectively "to correct existing evils" by, *inter alia*, "protect[ing] the right of collective bargaining." 29 U.S.C. § 251(b).

For example, in response to *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692–93 (1946), Congress rejected the Court's ruling that all activities that are "preliminary to or postliminary to"

principal work activities must be treated as compensable work time under the FLSA. 29 U.S.C. § 254(a)(2). Further, Congress restored the right of employees and employers to bargain collectively to reach their own determination of whether such preliminary activities should be considered compensatory work time. *See* 29 U.S.C. § 254(b).

Two years after the passage of the Portal-to-Portal Act, Congress further acted to carve out permissible areas of collective bargaining in the application of the FLSA's wage and hour laws. Congress passed an additional set of amendments to the FLSA, which, *inter alia*, served to ensure that collective bargaining rights would be honored regarding a number of important aspects of the wage and hour laws.

Most relevant here, Congress enacted § 203(o), which provides a partial definition of "hours worked." *See* 29 U.S.C. § 203(o); *see also* 29 C.F.R. § 785.6 (2013) ("[Section 203(o)] contains a partial definition of 'hours worked' . . . ."). This provision ensures that collective bargaining rights are respected as to two common preliminary and postliminary work activities—the time spent changing clothes and washing before and after work.[1] Under the Portal-to-Portal Act, whether such

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[1] Other provisions of the 1949 Amendments to the FLSA, including revisions to §§ 207(f) and 207(g) of the FLSA, similarly permit employers and employees by collective bargaining and other private agreements to enter into certain employment relationships that take precedence over the default rules adopted by Congress, as long as those agreements meet statutory minimum payment standards. 63 Stat. 910, 914–15 (1949) (codified as amended at 29 U.S.C. § 207(f)–(g)).

time is compensable first turns on whether it is deemed "preliminary or postliminary" to principal work activities, and thus otherwise noncompensable, or "integral and indispensable" to principal work activities, and thus otherwise compensable. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37, 42 (2005). Section 203(o) makes clear that regardless whether changing clothes or washing is preliminary or postliminary or integral and indispensable to the job, employees and their employer are nonetheless allowed to resolve through collective bargaining whether and how the time for such changing and washing is compensated. 29 U.S.C. § 203(o).

Absent a collective bargaining agreement addressing those issues, there can be significant ambiguity about the compensability of time spent changing clothes or washing at the beginning and end of each day. Such time may otherwise be noncompensible as preliminary, postliminary, or *de minimis*, or compensable as integral and indispensable to an employee's work. Section 203(o) allows the employer and employees, acting cooperatively, to resolve these ambiguities in a way that is mutually beneficial. The collective bargaining agreement also offers flexibility as it can be tailored to address different categories of workers and their different needs regarding washing and clothes-changing activities (whether involving a uniform, dress clothing, work clothing, protective clothing, clothing items to protect the public, or other items worn by the employee to perform his or her job).

Furthermore, as *amici* for Petitioners recognize, it is often difficult and inefficient to

measure the amount of time employees spend on the work site changing into their work attire. *See* AFL-CIO Br. 8. Collective bargaining permits the parties to overcome these difficulties and inefficiencies by adopting workable rules that fit the needs of the parties. *See Sepulveda*, 591 F.3d at 218.

Thus, the statute accords employees and the employer the flexibility to tailor the compensability of clothes-changing or washing activities in a way that suits the environment of each workplace. And that was the intended end of the statute. Representative Christian Herter, who introduced § 203(o), explained that employers and employees in certain industries had "carefully threshed out" through collective bargaining whether, for example, to treat as compensable the time that employees spent at the work site at the beginning and end of each day preparing for work by changing clothes. 95 Cong. Rec. at 11,210. Nonetheless, the concern was that the DOL might not respect the role and value of collective bargaining in this context and construe these collective bargaining agreements as violative of the FLSA. *Id.* Accordingly, § 203(o) was designed to close this potential "loophole" and "to give sanctity once again to the collective-bargaining agreements as being a determining factor in finally adjudicating that type of arrangement." 95 Cong. Rec. at 11,210.

As the Fourth Circuit observed, removing the compensability of clothes-changing time from "the give-and-take of the collective-bargaining process and putting it in courts or agencies could preclude such flexible and mutually preferable agreements." *Sepulveda*, 591 F.3d at 218. In this case, as the district court noted, employees at U.S. Steel's Coke

and Chemical Division successfully bargained for 20 minutes of compensable washing time at the end of each workday. Pet. App. 37a & n.2. Deference to such tailored collective bargaining agreements better comports with "the FLSA's spirit of protecting the interests of covered workers." *Figas v. Horsehead Corp.*, No. 06-1344, 2008 WL 4170043, at *9 (W.D. Pa. Sept. 3, 2008).

Hence, § 203(o) should not be viewed as a provision that detracts from employees' rights under the FLSA and, for that reason, given a narrow construction. Rather, it empowers employees to act collectively and to bargain over the time spent changing clothes, which might otherwise be noncompensable. If the employees cannot reach a satisfactory result as a product of collective bargaining, they can choose not to address the subject in the collective bargaining agreement and have the default rules of the FLSA apply. There is no reason to construe that power granted to employees in a narrow fashion. And there is no rational basis to read § 203(o) to allow collective bargaining over the changing of some types of clothing, but not others, such as protective clothing.

B. Related Provisions Of The FLSA Similarly Empower Employees To Bargain Collectively.

In addition to enacting § 203(o), Congress added other provisions to the FLSA that mandate respect for the role of collective bargaining. Section 207(b), for example, provides that employees are not subject to the FLSA's overtime provisions where a collective bargaining agreement imposes a certain

maximum hours requirement over a 26-week period. 29 U.S.C. § 207(b). And § 207(o) permits public agencies and workers to replace overtime compensation with compensatory time off through the collective bargaining process. *Id.* § 207(o); *see also Moreau v. Klevenhagen*, 508 U.S. 22 (1993).

Section 203(m), like § 203(o), is also a definitional provision that permits employers and their employees to deviate from a statutory default rule by private agreement. Section 203(m) offers a partial definition of the term "wage," which includes "the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees." 29 U.S.C. § 203(m). This provision further provides "[t]hat the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee." *Id.*

Congress added the collective bargaining component of § 203(m) to the FLSA as part of the Fair Labor Standards Amendments of 1961. Senator Barry Goldwater remarked during congressional debate that the purpose of this amendment was to ensure that the "fringe benefits" workers received, such as board and lodging, would be excluded from the calculation of wages under applicable collective bargaining agreements and would not offset overtime compensation. 106 Cong. Rec. 16,213–14 (1960). Unless the parties have collectively

bargained for this exclusion, the Wage and Hour Division is authorized to account for the reasonable cost of such benefits in the determination of wages. 29 C.F.R. § 531.2 (2013).

Like § 203(o), § 203(m) empowers employees to bargain collectively and reach agreements that can deviate from the FLSA's default rules. Under both § 203(m) and § 203(o), the agreements adopted collectively by the parties can and do benefit both the employer and its employees. There is no basis for treating these statutory provisions as ones favoring either the employer or employees. Rather, they respect collective bargaining and the ability of the parties to act in their mutual interest. Thus, rather than construing § 203(o) narrowly, as Petitioners argue, this Court should interpret § 203(o) in a broad manner that respects the outcome of collective bargaining agreements between employers and employees.

C. Section 203(o) Is A Definitional Provision That Defines The Limits Of The FLSA, Not An Exemption To The Act.

This Court's cases suggesting that exemptions from the FLSA should be narrowly construed do not apply here because § 203(o) is a definitional provision that sets limits on the FLSA, not an exemption from the Act.

1. This Court's recent decision in *Christopher v. SmithKline Beecham Corp.* forecloses any application of the narrow construction line of cases to § 203(o). There, the Court held that where the

FLSA term is a "general definition that applies throughout the FLSA," the term should not be construed narrowly. *Christopher*, 132 S. Ct. at 2172. That rationale equally applies here.

In *Christopher*, this Court considered the breadth of the "outside salesman" exemption in 29 U.S.C. § 213(a)(1) and the meaning of the word "sale" in 29 U.S.C. § 203(k). The Department of Labor's regulations provided that an "employee employed in the capacity of outside salesman" under § 213(a)(1) includes any employee whose primary responsibility is "making sales within the meaning of [§ 203(k)] of the Act." 29 C.F.R. § 541.500 (2013). This Court rejected the application of that narrow-construction approach to these statutory provisions:

> In the past, we have stated that exemptions to the FLSA must be "narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 4 L.Ed.2d 393 (1960). Petitioners and the DOL contend that *Arnold* requires us to construe the outside salesman exemption narrowly, but *Arnold* is inapposite where, as here, we are interpreting a general definition that applies throughout the FLSA.

Christopher, 132 S. Ct. at 2172 n.21 (alteration in original).

Like § 203(k), § 203(o) offers a general definition that applies elsewhere in the FLSA. Section 203(o) partially defines the meaning of "hours" in the FLSA's minimum wage and overtime provisions. This definition affects nearly every subsection of §§ 206 and 207. And § 203(o) is even *more* structurally removed from the FLSA's exemptions than § 203(k), which this Court determined should not be construed narrowly. Whereas the interpretation of § 203(k) affects the application of the "outside salesman" *exemption* in § 213(a)(1), *see* 29 C.F.R. § 541.500, the interpretation of "hours worked" does not clearly shape the contours of any of the exemptions from the FLSA. Consistent with *Christopher*, this Court should decline to construe § 203(o) narrowly against employers.

2. The narrow-construction approach also has no application here because, as Judge Posner explained, § 203(o) is an exclusion, not an exemption. Pet. App. 9a–10a. An exclusion narrows the scope of a statute, whereas an exemption creates an exception to statutory coverage without altering the limits of the statute. *See* Pet. App. 9a. Section 203(o) is plainly the former.

Section 203(o) is located in the "Definitions" section of the FLSA. In introducing this provision, Representative Herter explicitly stated that it was "an amendment to the definitions" of the FLSA. 95 Cong. Rec. at 11,210. Section 203 also contains another definitional exclusion, *see* 29 U.S.C. § 203(m), but nowhere uses the term "exemption."

Exemptions to the FLSA, by contrast, appear in § 213 (which is indeed titled, "Exemptions"). *Id.*

§ 213. These provisions exempt certain otherwise-covered employees from the FLSA's minimum wage and overtime requirements. The vast majority of § 213's exemptions provide that one or more remedial sections of the FLSA "shall not apply with respect to any employee" who satisfies certain criteria. *Id.* Contrary to Petitioners' assertion, it was not "mere happenstance" that Congress added § 203(o) to the "Definitions" section of the FLSA rather than the "Exemptions" section. Pet'r. Br. 54. It would be difficult, if not impossible, to modify the language of § 203(o) while preserving its intended meaning in a way that would conform to the structure of § 213. Section 213 provides when §§ 206 and 207, among other FLSA provisions, shall not apply to employees, whereas § 203(o) provides when certain hours shall not apply to §§ 206 and 207. Section 203(o) is thus only *inversely* related, if at all related, to § 213.

There are other important differences between § 203(o) and § 213. First, § 213 exempts entire categories of *employees* from the FLSA's minimum wage and overtime requirements while § 203(o) excludes certain *activities* from the definition of "hours worked." *Salazar*, 644 F.3d at 1138. Accordingly, employees subject to § 203(o) experience, at most, a reduction in the force of the FLSA's minimum wage and maximum hours provisions, whereas employees subject to § 213 are not covered by one or both of those provisions. *Id.*; *see also Adams* 471 F.3d at 1326 (distinguishing the exclusion of only limited activities from the FLSA with the exempt status of entire categories of workers).

Second, unlike the FLSA's rigid exemptions, § 203(o) gives employers and employees the *option* of removing certain otherwise compensable time from the definition of hours worked. *Salazar*, 644 F.3d at 1138. It is thus illogical to call § 203(o) an exemption when it is impossible to know whether it will serve to remove *any* time from the definition of hours worked until *after* the collective bargaining process has concluded.

For these reasons, the Fifth, Sixth, Seventh, Tenth, Eleventh, and Federal Circuits have each correctly reasoned that § 203(o) is not an exemption under the FLSA. Pet. App. 9a–10a; *Allen*, 593 F.3d at 458; *Franklin*, 619 F.3d at 612; *Salazar*, 644 F.3d at 1138; *Anderson*, 488 F.3d at 957; *cf. Adams*, 471 F.3d at 1325–26. And the Fourth Circuit has expressed skepticism that § 203(o) constitutes an exemption. *See Sepulveda*, 591 F.3d at 214 n.1.

The Ninth Circuit is the only court of appeals that has narrowly construed § 203(o), *Alvarez*, 339 F.3d at 905, but it never explained why the provision should be treated as an exemption, *see Salazar*, 644 F.3d at 1138 ("[T]he Ninth Circuit assumed, without analysis, that § 203(o) is an exemption and must be read narrowly.").

Because the FLSA, like other federal statutes,[5] differentiates between exclusions and

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[5] The Freedom of Information Act, for example, separately enumerates exclusions and exemptions. *Compare* 5 U.S.C. § 552(b), *with* 5 U.S.C. § 552(c). And in the bankruptcy law context, exempted property and excluded property refer to different types of assets that are treated differently by the bankruptcy estate. *Compare* 11 U.S.C. § 522, *with* 11 U.S.C. § 541(c)(2). *See also* Laurence B. Wohl, *Pension and Bankruptcy*

exemptions, and because § 203(o) clearly operates as an exclusion from the FLSA, the cases suggesting that exemptions from the FLSA are to be narrowly construed against employers simply have no application here.

D. This Court Should, In Any Event, Reject Any Anti-Employer Canon.

If this Court were, however, to determine that § 203(o) is an exemption from the FLSA and that it would otherwise be subject to this Court's cases requiring a narrow construction, it should revisit—and reject—that interpretive approach.

As Justice O'Connor explained in *Lingle v. Chevron U.S.A. Inc.*, sometimes "a would-be doctrinal rule or test finds its way into [this Court's] case law through simple repetition of a phrase—however fortuitously coined." 544 U.S. 528, 531 (2005). Such is the case with this Court's FLSA cases suggesting the propriety of a narrow construction approach. This Court in 1945 reasoned that, because the FLSA was "designed to extend the frontiers of social progress," exemptions from "such humanitarian and remedial legislation" should "be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress." *A. H. Phillips, Inc.*, 324 U.S. at 493 (citation omitted) (internal quotation marks omitted). Over the years, this principle has been shorn of its original concern for the plain language of the statute and has instead been contorted into an

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Laws: A Clash of Social Policies, 64 N.C. L. Rev. 3, 6 & n.18 (1985).

"anti-employer" canon, whereby if a provision of the FLSA could be interpreted to favor an employer, it must be read narrowly. As in *Lingle*, it is appropriate to reexamine the evolution and rationale behind this anti-employer canon and determine whether it maintains any validity today.

In *Mitchell*, 359 U.S. at 295–96, and *A. H. Phillips, Inc.*, 324 U.S. at 493, this Court applied earlier formulations of the canon to § 213(a)(2), which the Fair Labor Standards Act of 1989 subsequently repealed. *See* 103 Stat. 938, 939 (1989). Notably, neither *Mitchell* nor *Walling* suggested that the FLSA's provisions should be construed against employers. Rather, the Court emphasized the importance of the "literal words" of exemptions, *Mitchell*, 359 U.S. at 296, and "the plain meaning of statutory language and the intent of Congress," *A. H. Phillips, Inc.*, 324 U.S. at 493.

In *Arnold v. Ben Kanowsky, Inc.*, the Court further stated that exemptions from the FLSA should be narrowly construed "*against the employers* seeking to assert them." *Arnold*, 361 U.S. at 392 (emphasis added). From this statement some courts of appeals have held that the FLSA should generally be narrowly construed against employers. *See, e.g.*, *Solis v. Washington*, 656 F.3d 1079, 1083 (9th Cir. 2011). There is no basis for such a skewed presumption. The words of the statute mean what they say and should not be read myopically by the courts anytime it is perceived that a provision may inure more benefit to the employers than the employees. *See* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 355-66 (2012).

Thus, some appellate courts have rightly questioned the vitality of this "anti-employer" canon. For example, the Tenth Circuit has rejected this canon at the evidentiary stage, pointing out that *Arnold* applied the canon to legal, rather than factual, issues. *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1157 (10th Cir. 2012). And the Seventh Circuit criticized this canon on the grounds that its justification was "mysterious." *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 508 (7th Cir. 2007). As Judge Posner noted, "generalizations about interpretation, such as that exemptions from remedial statutes should be narrowly construed, are at best tie-breakers." *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1177 (7th Cir. 1987); *see also* Reading Law, *supra*, at 363 ("Without some textual indication, there is no reason to give statutory exceptions anything other than a fair (rather than a 'narrow') interpretation.").

To narrowly construe § 203(o) would be particularly inappropriate. Congress sought to create a balance between the FLSA's wage and hour rights and the NLRA's collective bargaining rights. In general, the minimum wage and maximum hours laws were deemed sacrosanct and not subject to collective bargaining. As to other applications of the wage and hour laws, including whether time spent changing or washing will be included as compensatory time, Congress reached a different judgment and believed it appropriate to empower the employees to negotiate terms that fit the needs of the particular employment context. Given that Congress has already made the judgment in favor of the "sanctity" of collective bargaining in this context, 95 Cong. Rec. at 11,210, there is no legitimate basis

for a court to tip the scales, one way or the other, in construing this statutory term.

II. THE DEPARTMENT OF LABOR'S CURRENT INTERPRETATION OF § 203(o) IS OWED NO DEFERENCE IN THIS CONTEXT.

In 2010, the Department of Labor issued an "Administrator Interpretation" in which it concluded that § 203(o) does not extend to protective clothing. Administrator Interpretation, Wage & Hour Div., U.S. Dep't of Labor, No. FLSA2010-2, 2010 WL 2468195, at *3 (June 16, 2010). This interpretation departs from the substance and the procedural practices of the Department's prior interpretations of "changing clothes."

Previously, the DOL would issue fact-specific opinion letters in response to requests from employers and employees. In well-reasoned letters from 2002 and 2007, the Department analyzed the text, legislative history, and purpose of § 203(o) and found that "changing clothes" includes protective clothing. Opinion Letter, Wage & Hour Div., U.S. Dep't of Labor, No. FLSA2002-2, 2002 WL 33941766, at *4 (June 6, 2002); Opinion Letter, Wage & Hour Div., U.S. Dep't of Labor, No. FLSA2007-10, 2007 WL 2066454 (May 14, 2007).

Now, the Wage and Hour Division will provide "Administrator Interpretations" that "set forth a general interpretation of the law and regulations, applicable across-the-board to all those affected by the provision in issue." Wage and Hour Division, U.S. Dep't of Labor, *Rulings and Interpretations*,

http://www.dol.gov/WHD/opinion/opinion.htm (last visited July 24, 2013). This "guidance," according to the Division, "will be useful in clarifying the law as it relates to an entire industry, a category of employees, or to all employees." *Id.*

The Seventh Circuit properly declined to defer to the DOL's interpretation of § 203(o). *See* Pet. App. 17a–20a. Because the DOL's Administrator Interpretation eschews traditional administrative procedures, fails to carry the force of law, and lacks persuasive value, this Court should accord no deference to the Department's interpretation of "changing clothes." The DOL has not even appeared in this Court to defend its interpretation or to argue that it warrants deference. That silence speaks volumes in support of the Seventh Circuit's ruling.

A. The Department Of Labor's Interpretation Lacks The Force Of Law And Does Not Warrant *Chevron* Deference.

A court defers to an administrative agency's reasonable interpretation of an ambiguous federal statute where Congress has authorized it to administer the statute. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984); *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). Not every action an agency takes falls within this limited deference. As this Court recently explained in *City of Arlington, Texas v. FCC*, where Congress speaks "in plain terms," deference to the Executive Branch's conflicting interpretation is improper. 133 S. Ct. 1863, 1868 (2013).

In the present case, the language of the statute is plain. Congress left no gaps for the agency to fill in § 203(o), and the DOL's interpretation of § 203(o) is not based on a permissible construction of that provision. The plain meaning of "changing clothes" in § 203(o) encompasses all types of clothing, including protective clothing. *See, e.g.*, *Franklin*, 619 F.3d at 614 ("Given the context of the workday, § 203(o) clearly applies to the [protective] uniform at issue"); *Sepulveda*, 591 F.3d at 216 ("This case . involves a straightforward application of the statutory text."); *Anderson*, 488 F.3d at 956 ("[T]he [protective] garments . . . fit squarely within the commonly understood definition of 'clothes' as that term is used in § 203(o)"). Indeed, all but one of the courts of appeals that have considered the meaning of § 203(o) have reasoned that "changing clothes" extends to protective clothing. Thus, the plain meaning controls here, and this statute is not properly subject to reinterpretation by the DOL. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989).

Even if "changing clothes" in § 203(o) is ambiguous, the DOL's Administrator Interpretation is not entitled to *Chevron* deference. As this Court explained in *United States v. Mead Corp.*, *Chevron* deference is appropriate only where Congress authorizes an administrative agency to promulgate interpretations or rulings that carry the "force of law." 533 U.S. 218, 221, 226–27 (2001). Whether an interpretation carries the force of law is for the courts, not the agency, to decide. *City of Arlington*, 133 S. Ct. at 1876.

Here, the DOL's Administrator Interpretation does not carry the force of law. Unlike Congress's "general grant of authority" to the Federal Communications Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out" the provisions of the Communications Act of 1934, *City of Arlington*, 133 S. Ct. at 1866 (quoting 47 U.S.C. § 201(b)), no such general grant to the DOL exists here. Rather, Congress empowered the Department to promulgate rules and regulations only with respect to specific provisions of the FLSA. In 29 U.S.C. § 213(a)(1), for example, Congress authorized the Secretary of Labor to "define[]" and "delimit[]," with limited exceptions, the scope of the FLSA's minimum wage and overtime exemptions for executive, administrative, and professional employees, including outside salespeople. *See Auer v. Robbins*, 519 U.S. 452, 456 (1997).

Congress also gave the DOL discrete grants of authority in the "Definitions" section of the FLSA, in which § 203(o) is located. Section 203(*l*) permits the Secretary to determine what forms of employment are "particularly hazardous" to children within the meaning of "[o]ppressive child labor," while § 203(m), as discussed above, permits the Secretary to determine the fair value of board and lodging when calculating a "[w]age." 29 U.S.C. § 203(l)–(m). Section 203(o) lacks any such authorization. Like the interpretation at issue in *Mead*, the Administrator Interpretation here is not based on a congressional grant of authority and therefore does not carry the force of law. *Cf. Mead Corp.*, 533 U.S. at 231–32.

The Department of Labor's own regulations further indicate that its Administrator Interpretation lacks the force of law. A regulation or order, according to the DOL, refers to authoritative rules that are "issued pursuant to statute by an administrative agency" and that "have the binding effect of law." 29 C.F.R. § 790.17(b) (2013). An administrative interpretation, by contrast, refers to "merely the agency's present belief concerning the meaning of applicable statutory language." *Id.* § 790.17(c). "Advisory interpretations" by the Wage and Hour Division "serve only to indicate the construction of the law which will *guide* the Administrator in the performance of his administrative duties." *Id.* § 775.1 (emphasis added). Indeed, the Wage and Hour Division itself contrasted the "guidance and compliance assistance" that its Administrator Interpretations offer with the "definitive" quality of its former opinion letters. *Rulings and Interpretations*, *supra*.

Even if Congress implicitly authorized the DOL to interpret definitional provisions of the FLSA—which is difficult to credit in the face of nearby explicit authorizations—the DOL's exercise of any such authority would not warrant *Chevron* deference. As this Court observed in *Mead*, the "overwhelming number" of cases that have applied *Chevron* deference have involved notice-and-comment rulemaking or formal adjudication. *Mead Corp.*, 533 U.S. at 230. Agency interpretations contained in opinion letters, policy statements, agency manuals, and enforcement guidelines, however, are typically issued without notice and comment or formal adjudication and thus do not deserve a high level of deference. *Christensen v.*

Harris Cnty., 529 U.S. 576, 587 (2000). In *Christensen*, this Court accorded no deference to the Wage and Hour Division's opinion letter interpreting an FLSA regulation on the grounds that the interpretation was unaccompanied by formal administrative procedures and was unpersuasive in any event. *Id.*

Adherence to formal administrative procedures is an important factor in determining the applicability of *Chevron* deference. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007).[6] The DOL's recent interpretation of § 203(o), however, employed neither formal administrative procedures nor any alternatives that would justify *Chevron* deference. The Wage and Hour Division did not subject its interpretation of § 203(o) to public notice and comment, thus preventing "fair notice" of its new legal position. *See Long Island Care*, 551 U.S. at 174. Although the DOL's Administrator Interpretation purports to offer "comprehensive guidance" about § 203(o), *see Rulings and Interpretations*, *supra*, the DOL arrived at that interpretation with even fewer procedural protections than its former opinion letters. Whereas the DOL's opinion letters responded to particular factual scenarios based on formal requests, the DOL's Administrator Interpretation represents a *sua sponte* effort to reinterpret the FLSA. Quite simply, there are no factors here that would support a high

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[6] "Longstanding" informal interpretations can in some instances also warrant *Chevron* deference. *See, e.g., Barnhart v. Walton*, 535 U.S. 212, 221–22 (2002). Here, as we explain below, the agency interpretation is neither formal nor longstanding.

level of deference. Indeed, the meaning of "changing clothes" is not essential to the overall administration of the FLSA, and the DOL's interpretations of § 203(o) have varied significantly over time. *Cf. Barnhart*, 535 U.S. at 222.

Notably, the Secretary of Labor as *amicus curiae* in the court below did not argue for *Chevron* deference to its Administrator Interpretation, only *Skidmore* deference based on the persuasiveness of its interpretation. Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellees/Cross-Appellants at 10 n.4, *Sandifer*, 678 F.3d 590 (7th Cir. 2012) (No. 10-1821). And the DOL has not even filed a brief before this Court defending the persuasiveness of its interpretation. Where the DOL has not even sought *Chevron* deference, none is due.[7]

B. The Department Of Labor's Interpretation Is Not Persuasive And Does Not Warrant *Skidmore* Deference.

Where an agency's informal interpretation fails to warrant *Chevron* deference, it may still be "entitled to respect" according to its persuasiveness. *Christensen*, 529 U.S. at 587; *see also Mead Corp.*, 533 U.S. at 228. The weight that courts attach to these types of interpretations is generally analyzed

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[7] *Auer* deference is unwarranted here because the DOL's Administrator Interpretation does not involve the Department's interpretation of its own ambiguous regulation. *See Gonzales v. Oregon*, 546 U.S. 243, 255 (2006) (citing *Auer*, 519 U.S. at 461–63).

under the framework of *Skidmore v. Swift & Co.* and depends, *inter alia*, on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. 134, 140 (1944). These factors include the care with which the agency has issued its interpretation, its level of expertise, and the formality of the agency's position. *Mead Corp.*, 533 U.S. at 228. Applying these considerations here, no deference is due to the DOL's interpretation of § 203(o).

1. The informal processes employed by the DOL here do not support deference to the agency's interpretation.

As an initial matter, the DOL's most recent interpretation of § 203(o) is inconsistent with its earlier pronouncements. The Department has modified its position on the compensability of donning and doffing protective clothing twice in the last two decades over the course of five opinion letters and one Administrator Interpretation. While an agency may, of course, change its interpretation of a statute when it believes that its prior position was mistaken, this Court has repeatedly explained that consistency is a factor in determining what measure of *Skidmore* deference, if any, is warranted. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013); *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443 n.4 (2013); *Christopher*, 132 S. Ct. at 2169.

As noted above, the DOL did not solicit public comment before changing its position on whether § 203(o) extends to protective clothing, nor did the

DOL issue its interpretation in the context of any specific factual dispute. The lack of such formal rulemaking in changing its views can be a factor counseling against deference. *Reno v. Koray*, 515 U.S. 50, 61 (1995) (according only "some deference" to an internal agency guideline that was not "subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment" (alteration in original) (internal quotation marks omitted)).

Where an agency fails to employ procedures that evince its careful consideration of an administrative matter, courts accord less deference. In *Gonzales v. Oregon*, for example, this Court declined to extend *Skidmore* deference to the Attorney General's interpretation of the Controlled Substances Act because, *inter alia*, the Attorney General failed to consult anyone outside the Department of Justice. 546 U.S. at 269. Similarly, this Court recently found unpersuasive the DOL's interpretation of the FLSA's "outside salesmen" exemption in part because the Department relied on its own "internal decisionmaking process" and provided no opportunity for public comment. *Christopher*, 132 S. Ct. at 2169.

As in *Christopher*, the DOL's interpretation here "lacks the hallmarks of thorough consideration." *Id.* Indeed, DOL's most recent interpretation did not bring to bear any of its expertise in construing "changing clothes" within the meaning of § 203(o). Rather, the DOL largely relied on the Ninth Circuit's opinion in *Alvarez* and several district court decisions for the proposition that § 203(o) does not extend to protective clothing.

Administrator Interpretation, 2010 WL 2468195, at *2–3.

2. The DOL's reasoning is beset by several logical shortcomings. In its Administrator Interpretation, the DOL observed that dictionary definitions of "clothes" were not uniform and argued that such definitions were inapposite to the proper construction of § 203(o). Administrator Interpretation, 2010 WL 2468195, at *1–2. At the same time, the DOL urged a "plain meaning" interpretation of § 203(o). *See id.* at *2–3. But as most courts of appeals that have addressed the issue have held, the unqualified meaning of "clothes" plainly *includes* clothes that are worn for protection (*i.e.*, protective clothing). *See Salazar*, 644 F.3d at 1139; *Franklin*, 619 F.3d at 615; *Sepulveda*, 591 F.3d at 214; *Anderson*, 488 F.3d at 955. Each of these opinions reached this conclusion by using dictionary definitions of the ordinary meaning of "clothes."

Furthermore, the DOL relied on a flawed interpretation of the legislative history. The Department noted that the original language of § 203(o) would have rendered noncompensable "any time" that was excluded from the workday pursuant to a collective bargaining agreement, but that the Conference Committee ultimately limited this exclusion to time spent "changing clothes" or washing. Administrator Interpretation, 2010 WL 2468195, at *2; *see also* 95 Cong. Rec. at 11,210. Based on this revision and a cursory examination of the congressional debate surrounding § 203(o), the DOL inferred that Congress intended to cabin the term "clothes" to those articles that employees in the baking industry wore in the 1940s. Administrator

Interpretation, 2010 WL 2468195, at *2. Although Representative Herter cited collective bargaining agreements in the baking industry when introducing § 203(o), he did so as an *example* of the types of private agreements that warranted statutory protection—not the types of *clothes*. *See* 95 Cong. Rec. at 11,210. And as discussed above, the goal of § 203(o) was to preserve the ability of employers and employees to bargain collectively. *Id.* The fact that Congress narrowed the original scope of § 203(o) from "any activity" to "changing clothes" does not imply that Congress similarly intended to narrow the plain meaning of "clothes."

More fundamentally, by excluding from the reach of § 203(o) all protective clothing "that is required by law, by the employer, or due to the nature of the job," 2010 WL 2468195, at *3, DOL has rendered this statutory provision a near nullity. *Cf.* Pet. App. 10a ("Since workers very rarely change at work from street clothes into street clothes, section 203(o) would . be virtually empty if the Ninth Circuit were right."). DOL's exclusion of all essential and required protective clothing would leave within the scope of § 203(o) only changes of clothing into nonprotective clothing, such as a uniform. Changing from street clothes into a uniform is, typically, "merely a convenience" to employees and is therefore noncompensable under the FLSA. *See* 29 C.F.R. § 790.8(c) (2013). Even before the enactment of § 203(o), employees and employers were already allowed to bargain collectively to compensate employees for such noncompensable time. 29 U.S.C. § 254(b). Thus, under the DOL's interpretation, § 203(o) is largely superfluous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 29 (2001) (noting that

statutory exceptions should not be interpreted as "entirely superfluous in all but the most unusual circumstances").

In light of the plain meaning and purpose of § 203(o) and the statutory structure of the FLSA, there is no basis to adopt Petitioners' narrow construction of § 203(o). And because the Department of Labor's interpretation of § 203(o) lacks the force of law, brings no expertise to bear, and is based on flawed reasoning, this Court should not accord even *Skidmore* deference to the Department's similarly narrow construction of § 203(o). Therefore, the Court of Appeals was correct in holding that § 203(o)'s plain terms are properly read to extend to the types of protective clothing that are at issue in this case.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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AMICUS CURIAE BRIEF

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CLIFTON SANDIFER, *et al.*,
Petitioners,

v.

UNITED STATES STEEL CORPORATION,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF GROCERY MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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BRIEF OF GROCERY MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

INTEREST OF THE *AMICUS CURIAE* [1]

The Grocery Manufacturers Association ("GMA") is the largest association of food, beverage, and consumer product companies in the world. Its members

[1] No party's counsel authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Petitioners filed a blanket consent to the filing of *amicus curiae* briefs in support of either or neither party with the Clerk of the Court. An email from Respondents consenting to the filing of this *amicus curiae* brief also has been filed with the Clerk of Court.

employ more than 2.5 million workers in all fifty states, with sales in the United States totaling over $300 billion annually. GMA leads efforts to increase growth and productivity in the food and beverage industry, and also works to promote the safety and security of the Nation's food supply. GMA has been an active advocate for leading food, beverage and consumer product companies in the United States since 1908, applying the accumulated scientific and legal expertise of its member companies to vital public policy issues affecting the industry.

GMA and its members have a significant interest in the question presented in this case. Employees who work the production lines in the food and beverage industry are required by law or their employers to wear work clothes designed both to protect food safety and to protect employees from workplace injuries. The protective clothing worn by employees working on a food or beverage production line is less cumbersome than in the steel industry. Employees of GMA members may be required – for their own safety or to protect food safety – to wear hairnets, bump caps, ear protection, safety glasses, mouth guards, gloves, jackets, smocks, aprons and safety boots. Relying on Section 3(o) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(o) ("Section 3(o)"), some GMA members have negotiated with the unions representing their employees regarding compensation for donning and doffing such gear. Reversal of the Seventh Circuit's decision would throw the validity of such agreements, and similar long-standing customs or practices, into doubt. The class action litigation and retroactive liability that would follow could be devastating to many employers in the industry. Even assuming only ten minutes of unpaid time per day (50 minutes for a five-day work week), liability per

employee could easily reach $1,578.66 – or $1,578,660 per 1,000 employees in an industry that employs millions.[2]

SUMMARY OF ARGUMENT

Section 3(o) of the FLSA allows unions and employers to bargain collectively regarding compensation for "any time spent in changing clothes or washing at the beginning or end of each workday." 29 U.S.C. § 203(o). The term "clothes" in this section is broad and unqualified. The context of the term – the activity of donning and doffing clothes in the workplace at the beginning and end of the work day – supports a broad and unqualified interpretation. The purpose of Section 3(o) is to leave the compensability of such clothes-changing time to collective bargaining, and only a broad interpretation of the term "clothes" can effectuate that purpose.

Yet, Petitioners ask the Court to re-write Section 3(o) by imposing new limitations on the types of

---

[2] This potential liability was calculated as follows: $12.68 per hour x 1.5 x 0.83 hours = $15.79 per employee, per week x 50 workweeks = $789.33 per year x 2 years = $1,578.66 per employee. *See* Bureau of Labor Statistics, *May 2012 National Occupational Employment and Wage Estimates, United States, Occupation #51-3000: Food Processing Workers,* available at http://www.bls.gov/oes/current/oes_nat.htm#51-0000 (last visited on July 8, 2013) (median hourly wage of food processing workers). This calculation assumes that the U.S. Department of Labor and federal courts would find that employers acted in good faith reliance on Section 3(o) and did not act willfully. Thus, the calculation does not include the additional remedies available under the FLSA of a third year of back wages or liquidated damages. Including these additional remedies would result in liability of $4,735.98 per employee.

clothing that can be the subject of collective bargaining. Petitioners contend that the term "clothes" should be interpreted to exclude items that, unlike ordinary clothing, are used to protect employees against workplace hazards and were designed to provide such protection.

Petitioners' proposed interpretation is contrary to the text and context of Section 3(o). A narrow interpretation of Section 3(o) also is unsupported by contemporaneous usage of the term "clothes" in dictionaries and court decisions. Finally, nothing in the legislative history indicates that Congress intended Section 3(o) to exclude any of the various items that employees are required to wear in order to perform their jobs.

It is important to reflect on what Section 3(o) does not do: Section 3(o) does not deprive employees of coverage under the FLSA. Section 3(o) does not exempt employees from the minimum wage and overtime requirements in the FLSA. Section 3(o) does not deprive any employee of any substantive rights under the FLSA.

Rather, Section 3(o) allows a union to negotiate with employers regarding whether, when and how much employees will be compensated for the time they spend changing clothes. This is an additional substantive right not enjoyed in non-union workplaces. Employees covered by collective bargaining agreements ("CBAs") may choose to forego pay for the 5, 10 or 15 minutes a day they spend donning and doffing work clothes in exchange for higher hourly wages or decreased health insurance premiums. Employees who do not belong to unions have no choice – even if an increased hourly wage would net higher compensation than being paid for time spent changing clothes.

In the guise of "narrowly construing" limitations "on the scope and the rights established by the FLSA," Pet. Br. at 51, Petitioners ask the Court to deprive employees of their right to bargain collectively regarding pay for time spent changing clothes.

Further, having already received the benefit of their bargain, Petitioners ask the Court to set aside and ignore over 65 years of practice under bona fide collective bargaining agreements and impose substantial retroactive liability on U.S. Steel. The CBAs between U.S. Steel and the United Steelworkers union have provided that the company would not compensate employees for clothes-changing time *since 1947* – two years *before* the 1949 enactment of Section 3(o). This case seems to be the very situation that Congress enacted Section 3(o) to avoid.

We urge the Court to reject Petitioners' plea to narrowly construe Section 3(o) as unsupported by the statutory text, context and purpose, contemporaneous usage or legislative history. Instead, the term "clothes" should be interpreted as written, intended and necessary to effectuate the purpose of Section 3(o): broadly, without modification or limitation, to prevent federal courts or the DOL from overriding carefully negotiated collective bargaining agreements and imposing significant retroactive liability on employers.

ARGUMENT

I. THE TERM "CLOTHES" IN SECTION 3(o) IS BROAD AND UNQUALIFIED

Section 3(o) of the FLSA allows employees and employers to bargain collectively regarding compensation for "any time spent in changing clothes or washing at the beginning or end of each workday." 29 U.S.C.

§ 203(o). The term "clothes" in this section stands unmodified, without qualifiers. The statutory text does not limit the term "clothes" by function, form, composition or the place where the item is worn on the body.

Yet, Petitioners ask the Court to re-write Section 3(o) by imposing new qualifications and limitations that do not appear in the text. Petitioners contend that the term "clothes" in Section 3(o) "should be interpreted to exclude items that, unlike ordinary clothing, both are used to protect employees against workplace hazards and were designed to provide such protection." Pet. Br. at 43.

A closer study of Petitioners' brief reveals that they would have this Court exclude all of the following items from the broad term "clothes":

- Hardhats (Pet. Br. at 7);
- Safety glasses (Pet. Br. at 7);
- Earplugs (Pet. Br. at 7);
- Respirators (Pet. Br. at 7);
- Flame retardant hoods (Pet. Br. at 7);
- Flame retardant jackets (Pet. Br. at 7);
- Flame retardant pants (Pet. Br. at 7);
- Wristlets (Pet. Br. at 7);
- Work gloves (Pet. Br. at 7);
- Leggings (Pet. Br. at 7);
- Steel-toed boots (Pet. Br. at 7);
- Knife scabbards (Pet. Br. at 16);
- Items that cover only areas usually covered by ordinary clothing (Pet. Br. at 19);

- Items worn on the extremities (Pet. Br. at 19);
- Items made of hardened plastic (Pet. Br. at 20);
- Items made of rubber (Pet. Br. at 20);
- Items made of leather (Pet. Br. at 20);
- Items made of metal (Pet. Br. at 20);
- Items made of a combination of metal and other materials (Pet. Br. at 20);
- Items made of heavy material (Pet. Br. at 20);
- Items infused with chemicals (Pet. Br. at 20);
- Items intended to protect the wearer from injury or death (Pet. Br. at 20);
- Items worn over street clothes (Pet. Br. at 22);
- Aprons (Pet. Br. at 26);
- Overalls (Pet. Br. at 26);
- Bulletproof vests (Pet. Br. at 36);
- Flak jackets (Pet. Br. at 36);
- Bulletproof pants (Pet. Br. at 36);
- Radiation-proof lead lined underpants (Pet. Br. at 36-37);
- Airbag vests and jackets worn by equestrians (Pet. Br. at 37);
- Items designed and used to protect the wearer from hazards such as bullets, spinal fractures, burn scarring or molten metal (Pet. Br. at 38);
- Medieval chain mail armor (Pet. Br. at 41);
- Hair and beard nets (Pet. Br. at 41);
- Jump suits (Pet. Br. at 41);

- Space suits (Pet. Br. at 41);
- Plastic sleeves (Pet. Br. at 41);
- Sleeves unconnected to a shirt or blouse (Pet. Br. at 41);
- Steel mesh gloves (Pet. Br. at 41);
- Lead pants (Pet. Br. at 41);
- Any item not considered ordinary apparel (Pet. Br. at 44); and
- Any item that employers are required to provide employees under OSHA's personal protective equipment regulations (Pet. Br. at 57).

Thus, Petitioners would re-write Section 3(o) as follows:

> **(o) Hours Worked.**— In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing ordinary clothes made of ordinary cloth, that are not worn over street clothes and cover only areas usually covered by street clothes, and that are not used or designed to protect employees from workplace hazards, injury or death, or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

Work clothes serve many different purposes. Work clothes can protect consumer food products from contamination. *See McComb v. C.A. Swanson & Sons, D.C.*, 77 F. Supp. 716, 720 (D. Neb. 1948). Work

clothes keep employees' street clothes free from "grime," "dirt," and "smears of ink" that would have otherwise ruined their personal clothing. *Mitchell v. Southeastern Carbon Paper Co.*, 124 F. Supp. 525, 525 (D. Ga. 1954), *aff'd* 228 F.2d 934 (5th Cir. 1955). Work clothes also serve as a means of identification. *Battery Workers' Union Local 113, United Elec., Radio & Mach. Workers v. Elec. Storage Battery Co.*, 78 F. Supp. 947, 948-50 (D. Pa. 1947). Finally, work clothes have long protected workers from workplace hazards. *Steiner v. Mitchell*, 350 U.S. 247, 250-51 (1956); *Ciemnoczolowski v. The Q.O. Ordnance Corp.*, 228 F.2d 929, 931-32 (8th Cir. 1955); *Laudenslager v. Globe-Union, Inc.*, 180 F. Supp. 810, 813 (D. Pa. 1958).

Congress could have added qualifying and limiting adjectives to Section 3(o), but it did not. Nothing in the text of the statute indicates in any way that the bare and broad term "clothes" includes only "ordinary apparel" that is not used or designed to protect employees against workplace hazards. Section 3(o) uses the term "clothes" – not "ordinary clothes," "clothes made of ordinary cloth," or "nonprotective clothes." *See Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 215 (4th Cir. 2009) (the statute does not use such qualifying adjectives as "ordinary clothes," "street clothes," or "nonprotective clothes").

Limiting the definition of "clothes" to "ordinary" clothing would leave Section 3(o) an empty and meaningless shell. The donning and doffing of ordinary clothing in the workplace – which generally would not be required either by law or the employer – is not compensable under the Portal-to-Portal Act. 29 U.S.C. § 254(a). Donning and doffing only becomes a compensable "principal activity" when an employee must change into specialized, protective clothes

necessary to perform the work. *Steiner*, 350 U.S. at 256. Congress could not have intended Section 3(o) to cover only ordinary clothing when donning and doffing such clothing was already non-compensable under the Portal-to-Portal Act.

II. CONTEMPORANEOUS USAGE OF THE TERM "CLOTHES" SUPPORTS A BROAD INTERPRETATION

When a statutory term is undefined, it is normally construed "in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). Thus, the first task is to look at the ordinary meaning of the term "clothes" at the time Congress enacted Section 3(o) in 1949.[3] *Perrin*, 444 U.S. at 42. Neither dictionary definitions nor court decisions published contemporaneously with Section 3(o) support Petitioners' view that the term "clothes" was narrowly understood in 1949 to exclude clothes used for a protective purpose.

A. Contemporaneous Dictionary Definitions

Contemporaneous dictionaries defined the term "clothes" broadly. The 1949 edition of Funk & Wagnalls Standard Dictionary defined "clothes" as

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[3] Petitioners argue that "patterns of current usage" support a distinction between "protective items" and "clothes," Pet. Br. at 43, but such patterns are irrelevant to determining the ordinary meaning of "clothes" when Section 3(o) was enacted.

"the various articles of raiment worn by human beings; garments collectively." Funk & Wagnalls Standard Dictionary of the English Language 505 (1949). "Raiment" was defined as "wearing apparel; clothing." *Id.* at 2044. In turn, "apparel" was defined as "the things collectively with which one is clad, or which one wears as clothing, esp. the outer garments; raiment; garb." *Id.* at 134. "Clothing" was defined as "dress in general; garments; raiment; apparel." *Id.* at 505; *see also* Webster's New International Dictionary 507 (2nd ed. 1948) ("clothes" defined as "covering for the human body").

These definitions have a central theme: "clothes" are articles "worn by human beings" and "with which one is clad." The definitions do not limit the meaning of the term "clothes" to ordinary apparel or street clothes, made of ordinary cloth, that are not used to protect employees from injury.

Petitioners rely upon the 1948 Webster's New International Dictionary of the English Language, which defined "clothes" as "covering for the human body; dress; vestments; vesture; a general term for whatever covering is worn, or is made to be worn, for decency or comfort." Pet. Br. at 33 (citing Webster's Second New Int'l Dictionary 507 (1948)). Petitioners argue, based on this definition, that only items with a "primary purpose" to assure comfort or decency qualify as clothing. Pet. Br. at 16. Petitioners also contend: "If the primary purpose of a particular item is not to provide 'decency or comfort,' it is *less likely* to be referred to as clothes." Pet. Br. at 34 (emphasis added). Petitioners' use of the phrase "less likely" is an interesting hedge – necessary to avoid a conflict between their reading of the 1948 Webster's definition and their argument that Congress intended Section

3(o) only to cover clothes like those worn in 1949 by bakery workers. Petitioners state: "Representative Herter, the original proponent of the proposal that became section 203(o), specifically pointed to the clothes-changing of bakery workers as the paradigm to which his legislation was addressed." Pet. Br. at 46. However, Petitioners also concede that the purpose of "work clothes" in the bakery industry was to "assure the safety of food." *Id.; see also* Pet. Br. at 45 (mid-twentieth century workers "changed clothes at the beginning and end of the day because the work environment was dirty," and their work clothes would be "filthy"). Thus, under Petitioners' reading of the Webster's definition, items worn by bakery workers in 1949 would not be "clothes" because the primary purpose of wearing the items was food safety – not "decency or comfort."

A better reading of the 1948 Webster's definition is that clothes are "covering for the human body" which includes but is not limited to coverings worn for "decency or comfort." Examples abound of "ordinary apparel" worn on the street that is neither "decent" nor "comfortable." All clothes have multiple functions. All clothes (then and now) have a protective function: "Protection – against sun, cold, wind, blisters, stains, insect bites, and being spotted by animals that one is hunting – is a common function of clothing, and an especially common function of work clothes worn by factory workers." *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 594 (7th Cir. 2012). Motorcycle riders wear leather pants for comfort, decency *and* protection from injury, but Petitioners would exclude this common type of clothing from the meaning of the term "clothes"

in Section 3(o). Pet. Br. at 20 (excluding items made of leather).[4]

B. Contemporaneous Court Decisions

A review of contemporaneous court decisions, from shortly before and after the enactment of Section 3(o), demonstrates that courts had considered a wide variety of protective clothing in many industries, both in the context of determining whether donning and doffing was compensable work time and in applying Section 3(o). *See, e.g.*, *Steiner*, 350 U.S. at 247 (protective clothing in a toxic battery plant); *Bumpus v. Remington Arms Co.*, 183 F.2d 507 (8th Cir. 1950) (protective clothing in a manufacturing plant); *Newsom v. E.I. Du Pont De Nemours & Co.*, 173 F.2d 856, 857 (6th Cir. 1949) (aprons, overalls and shirts); *McComb*, 77 F. Supp. at 720-21, 723 (aprons, frocks, coveralls with buttons down the front, trousers, hairnets and rubber boots); *Battery Workers' Union*, 78 F. Supp. at 947 (guard uniforms); *McIntyre v. Joseph E. Seagrams & Sons Co., Inc.*, 72 F. Supp. 366, 370 (D. Ky. 1947) (one-piece garment referred to as a coverall or uniform, cap, and safety shoes).

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[4] Petitioners contend that personal safety equipment was "relatively uncommon" when Section 3(o) was adopted and, as an example, state that the hard hat "did not come into widespread use until the 1960s." Pet. Br. at 46-47. However, the website cited by Petitioners states only that thermoplastics replaced fiberglass in hard hats in the 1950s and 1960s. In discussing the history of the hard hat, the website Bullard, *History of the Hard Hat*, http://ww.bullard.com/V3/products/head_face/head_protection/Hard_Hat_History/ (last visited July 8, 2013) explains that: The "hard boiled hat" was patented in 1919; hard hat areas existed as early as during the construction of the Golden Gate Bridge (which was completed in April 1937); the first aluminum hard hat was designed and manufactured in 1938; and, heat-resistant fiberglass hard hats were developed in the 1940s. *Id.*

None of these cases distinguished between clothes that protect employees from workplace hazards and clothes with some other function, and most involved clothes that Petitioners would exclude from Section 3(o). *See e.g.*, Pet. Br. at 7 (boots and hats); *id.* at 26 (aprons, overalls); *id.* at 41 (hairnets).

McComb, a case decided in 1948, is illustrative of a work environment where employees donned durable protective clothing designed to be worn at work only. In this case, poultry and dairy employees wore uniforms that were "made from fairly heavy tough materials" and the employer prohibited employees from wearing any other work clothes that were "privately designed." *McComb*, 77 F. Supp. at 720-21; *see also* Pet. Br. at 20 (items made of heavy materials should be excluded from Section 3(o)). Federal law required the wearing of "aprons, frocks and other outer clothing worn by persons who handled any product" to prevent the product from becoming contaminated by perspiration, hair, or cosmetics. *McComb*, 77 F. Supp. at 720-21. The court described the clothing worn by the employees in some detail. Male employees wore "coverall[s] with buttons down the front" and female employees either wore a "bungalow apron designed without buttons and to be slipped on and removed over the head" or a "covering garment, buttoned down the front and coatlike in design." *Id.* In addition, the employer required female employees to wear "hairnets" for "*safety* and sanitary" reasons and it required male employees to wear "rubber boots" if they were frequently working on wet surfaces for "*health* and security" reasons. *Id.* (emphasis added).

The Supreme Court's 1956 decision in *Steiner v. Mitchell* also did not distinguish between protective

and non-protective clothing. In *Steiner*, the Court agreed with the Secretary of Labor that battery plant employees working in a dangerous work environment were entitled to compensation under the FLSA for donning and doffing required clothing items on the employer's premises. *Steiner*, 350 U.S. at 256. The Court emphasized the significant health hazards associated with working in the plant, explaining that the employees customarily worked "with or near the various chemicals used in the plant," including "lead metal, lead oxide, lead sulphate, lead peroxide, and sulphuric acid." *Id.* at 249. The toxic lead chemicals attached themselves to the clothing, skin, and hair of the employees, and the sulphuric acid not only caused severe burns but also caused clothing to disintegrate or rapidly deteriorate on contact. *Id.* at 250. The Court noted that safe operation required the removal of clothing at the end of the shift, hence state laws mandating on-site changing facilities. *Id.*

Against this factual background, the Court explained that "activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the FLSA if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed." *Id.* at 256. The Court concluded "it would be difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of the principal activity of employment than in the case of these employees." *Id.*

Although Section 3(o) was not directly at issue in *Steiner*, the Court found the DOL's position (that changing into the protective clothing was compensable) "strengthened by [Section 3(o)] since its clear

implication is that clothes changing and washing, which are otherwise a part of the principal activity, may be expressly excluded from coverage by agreement." *Id.* at 254-55. It seems unlikely that the Court would have reached this conclusion if the term "clothes" in Section 3(o) excluded the type of protective clothes at issue in the case.

In 1954, a district court held that changing clothes to protect employees from grime, dirt, perspiration, and smears of ink was not integral to the employees' principal activity and not compensable because employees were changing for their own convenience. *Mitchell*, 124 F. Supp. at 526. Although unnecessary to the holding and thus *dicta*, the court additionally found that Section 3(o) also would bar relief because the employer did not have a custom or practice of paying for this time. *Id.* at 529. The Fifth Circuit affirmed the lower court's holding, and explained that the district court's reliance on Section 3(o) was unnecessary. Nonetheless, the Fifth Circuit did not dispute that changing into protective clothing would be subject to Section 3(o). *Mitchell v. Southeastern Carbon Paper Co.*, 228 F.2d 934, 937, 939 (5th Cir. 1955).

In 1955, the Eighth Circuit addressed whether clothes-changing time by production line operators was compensable under the Portal-to-Portal Act and Section 3(o). There, the workers were engaged in melting, pouring, and processing explosives and were required to change their clothes and take a shower after their shift. *Ciemnoczolowski*, 228 F.2d at 931-32. The clothing was undisputedly protective in nature. The employees were "required to change their clothes as a safety precaution against explosion which might be caused by sparks from metallic objects on or in

conventional clothing." *Id.* The Eighth Circuit found that the clothes-changing and washing time was preliminary and thus not compensable, which meant that reaching the Section 3(o) issue was unnecessary. However, like *Steiner* and *Mitchell*, the court indicated that the clothes-changing time would also be noncompensable under Section 3(o). The protective clothing at issue, by implication, fell within the Section 3(o) exclusion and "no contract or custom or practice to pay for such had been shown." *Id.* at 932-34.

In the 1958 *Laudenslager* decision, the employees were exposed to lead and acid in varying degrees. The union and employer bargained for employees to be paid 24 minutes per day for changing into protective clothing and washing. 180 F. Supp. at 812-13. Nonetheless, three employees sued claiming that the 24 minutes did not fully compensate them for that time. The court rejected their argument and held that, even if there was "excess [compensable] time," Section 3(o) barred relief. *Id.*

In 1962, a district court found that changing into coveralls, aprons, gloves, goggles, and hoods was governed by Section 3(o) "where such time is the subject of a collective bargaining agreement or is excluded by custom or practice under such an agreement." *Nardone v. Gen. Motors, Inc.*, 207 F. Supp. 336, 339-40 (D.N.J. 1962).

These cases demonstrate that, from the earliest interpretations of the statutory language, the "ordinary or natural meaning" of the term "clothes" within the context of a work environment includes all types of gear that employees were required to wear in order to perform their jobs. The courts considered, *inter alia*, frocks, jackets, coveralls, aprons, hairnets, boots, gloves, goggles, hoods and other clothes

designed to protect employees from lead, acid, chemicals and explosives – all of which Petitioners claim have never been covered by Section 3(o). But none of the courts distinguished between protective and non-protective clothing. Congress intended Section 3(o) to include all types of clothing that protects employees from workplace hazards.

III. THE PURPOSE OF SECTION 3(o), AS REVEALED BY ITS LANGUAGE AND LEGISLATIVE HISTORY, SUPPORTS A BROAD INTERPRETATION OF THE TERM "CLOTHES"

The history of the Fair Labor Standards Act, as enacted in 1938, and the subsequent early amendments to the FLSA, provide further context for discerning the purpose of Section 3(o) and, thus, the meaning of the term "clothes." The FLSA requires employers to pay employees at least the minimum wage for all hours worked and to pay overtime for hours over 40 in a workweek. Despite the importance of the concept of "work," Congress did not define that term in the FLSA. Federal courts were required to fill the gap. In 1944, the Supreme Court broadly defined "work" as physical or mental acts, whether burdensome or not, controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944); *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). In 1946, the Supreme Court held that "the statutory workweek" included "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946).

These broad definitions of "work" surprised many, including employers, who faced a flood of FLSA litigation following the *Mt. Clemens* decision. "By some reports, claims totaling a billion dollars on behalf of industrial employers were filed by the end of 1946." *Sepulveda*, 591 F.3d at 217-18 (quotations and citation omitted).

Finding the judicial definitions at odds with "long-established customs, practices, and contracts between employers and employees" and so expansive they created "wholly unexpected liabilities, immense in amount and retroactive in operation," Congress passed the Portal-to-Portal Act in 1947. 29 U.S.C. § 251(a). The Portal-to-Portal Act amended the FLSA to narrow the judicial definition of "work" by excluding two categories of activities:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities the employee is employed to perform; and
>
> (2) activities that are preliminary or postliminary to the principal activity or activities, which occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he or she ceases, such principal activity or activities.

Id. § 254(a). Although the Portal-to-Portal Act answered important questions regarding time spent traveling to and from work, Congress left many questions unanswered by failing to define the terms "principal," "preliminary" and "postliminary" activities.

One of the unanswered questions was whether employees must be paid for time spent donning and

doffing work clothes: Is donning and doffing a preliminary and postliminary activity and thus noncompensable? Or, should it be considered part of an employee's "principal activity" for which he must be paid?

At least in the Senate, this issue was discussed during debates on the Portal-to-Portal Act. Senator Cooper, a sponsor of the Portal-to-Portal Act, responding to a question from Senator McGrath, concluded: "if the employee could not perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable as part of his principal activity." 93 Cong. Rec. 2297-98 (daily ed. March 20, 1947). The colloquy between Senator Cooper and Senator McGrath follows in its entirety:

Senator McGrath questions:

> In certain of our chemical plants workers are required to put on *special clothing* and to take off their clothing at the end of the workday, and in some of the plants they are required to take shower baths before they leave. Does the Senator regard such activity as that as coming within the compensable workday?

Id. (emphasis added).

Senator Cooper responds:

> I am very happy that the Senator has asked the question, because I believe it gives the opportunity of drawing a fine distinction between the type of activity which we consider compensable and the type which should not be compensable. In accordance with our intention as to the definition of 'principal activity,' if the employee could not

> perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable as part of his principal activity. On the other hand, if changing clothes were merely a convenience to the employee and not directly related to the specific work, it would not be considered a part of his principal activity, and it follows that such time would not be compensable.

Id.

Despite Congress' efforts, litigation and DOL investigations regarding whether and how much employees should be paid for time spent donning and doffing protective clothing continued unabated. *See, e.g., Steiner*, 350 U.S. at 247; *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

Two years later, in 1949, Congress again acted to curb unexpected retroactive FLSA liability – this time, liability confronting employers whose workers were covered by CBAs – by enacting Section 3(o). *See Sepulveda*, 591 F.3d at 217 ("Congress continued its effort to restore sanctity to private agreements by adding Section 203(o) to the FLSA."); *Anderson v. Cagle's Inc.*, 488 F.3d 945, 958 (11th Cir. 2007) ("Congress's efforts to curtail employee-protective interpretations of the FLSA continued when the FLSA was amended two years later to add, among other things, what would become § 203(o).").

Representative Herter, the sponsor of the bill that became Section 3(o), offered the amendment for the "purpose of avoiding another series of incidents which led to the portal-to-portal legislation and led to the overtime-on-overtime legislation." 95 Cong. Rec. H11,210 (daily ed. Aug. 10, 1949). Representative

Herter's concern was that the DOL would override a carefully negotiated collective bargaining agreement between a union and an employer concerning how much compensable time to allocate to changing clothes and washing. He observed:

> At the present moment there is a twilight zone in the determinations of what constitutes hours of work which have been spelled out in many collective bargaining agreements but have not necessarily been defined in the same ways.
>
> Let me be specific. In the bakery industry, for instance, which is 75 percent organized, there are collective-bargaining agreements with various unions in different sections of the country which define exactly what is to constitute a working day and what is not to constitute a working day. In some of those collective-bargaining agreements the time taken to change clothes and to take off clothes at the end of the day is considered a part of the working day. In other collective-bargaining agreements it is not so considered. But, in either case the matter has been carefully threshed out between the employer and the employee and apparently both are completely satisfied with respect to their bargaining agreements.
>
> The difficulty, however, is that suddenly some representative of the Department of Labor may step into one of those industries and say, "You have reached a collective-bargaining agreement which we do not approve. Hence the employer must pay for back years the time which everybody had considered was excluded as a part of the working day. That situation may arise at any moment. This amendment is offered merely to

> prevent such a situation arising and to give sanctity once again to the collective-bargaining agreements as being a determining factor in finally adjudicating that type of arrangement. It sounds wordy, but in effect it is a very simple amendment.

Id. At the time, Section 3(o) was supported by both unions and management. *Id.*; *see also Mitchell*, 124 F. Supp. at 527-28 (Section 3(o) was enacted because "all members of Congress interested therein had in mind that such changing time and activities would not be part of the work-week if there was an agreement, custom, or understanding, excluding the same.").

This legislative history reveals that the purpose of Section 3(o) was to allow an employer and union to bargain collectively regarding compensation for time spent "changing clothes" and "washing" before and after work – without fear that the DOL or federal courts would invalidate the bargain and impose retroactive liability on the employer. That purpose is reflected in the text of Section 3(o), which excludes time spent changing clothes from compensable work time only "by the express terms of or by custom or practice under a bona fide collective bargaining agreement applicable to the particular employee." 29 U.S.C. § 203(o).

The facts in this case demonstrate the very situation that Section 3(o) was enacted to avoid: Since 1947, two years *before* the 1949 enactment of Section 3(o), the collective bargaining agreements between U.S. Steel and the United Steelworkers union have provided that the company would not compensate employees for "time spent in preparatory and closing activities." Pet. Br. at 10-11. Most recently, in 2008, subsequent to the Petitioners filing this case, the Steelworkers confirmed the agreement in the CBA by adding more

specific language: The company would not compensate employees for time spent "donning and doffing protective clothing." *Id.*

Now, having received the benefit of their bargain, Petitioners ask the Court to set aside and ignore over 65 years of practice under a bona fide collective bargaining agreement and impose substantial retroactive liability on U.S. Steel.

By enacting Section 3(o), Congress intended that the issue regarding compensability of donning and doffing time be determined through collective bargaining between employer and employees, without interference from the DOL or the federal courts. A narrow definition of the term "clothes" which excludes countless items worn on the human body would again put every collective bargaining agreement at risk of being found invalid, thus defeating the purpose of Section 3(o) entirely. Congress left this field to collective bargaining. Only a broad interpretation of the term "clothes" can keep the issue as a matter of collective bargaining, rather than as a source of endless litigation requiring federal courts to determine, item by item, whether a piece of gear falls within the narrow and complicated definition of "clothes" proposed by Petitioners. A broad definition of "clothes" is necessary to effectuate the purpose of Section 3(o).

IV. OSHA REGULATIONS AND WAR LABOR BOARD DECISIONS HAVE NO BEARING ON THE MEANING OF THE TERM "CLOTHES"

Perhaps because of the lack of support in the text, context and purpose of Section 3(o), Petitioners have scavenged for obscure and inapposite sources to

support its complicated definition of "clothes." Petitioners rely on regulations issued under the Occupational Safety and Health Act of 1970 ("OSHA") (Pet. Br. at 57-60), decisions from the obscure War Labor Board (*Id.* at 25-26), and a 1995 publication regarding the art of dress in England and France from 1750 to 1820 (*Id.* at 34). The fact that Petitioners had to turn to such sources itself demonstrates that their proposed definition of "clothes" was *not* in common usage when Section 3(o) was enacted in 1949.

A. OSHA Regulations

Petitioners invite the Court to graft OSHA's personal protective equipment (PPE) regulations into Section 3(o), contending that the regulations "provide an already established body of law that distinguishes such protective equipment from ordinary clothing." Pet. Br. at 44; *see also id.* at 57-60. OSHA regulations are not an appropriate source for discerning the meaning of the term "clothes" in Section 3(o) of the FLSA.

First, the regulations are not contemporaneous with the enactment of Section 3(o). Congress enacted Section 3(o) in 1949. OSHA was not enacted until 1970. Moreover, Section 3(o) was enacted by Congress, and the OSHA regulations were promulgated by the Department of Labor.

Second, the OSHA regulations have a different purpose than Section 3(o). The purpose of Section 3(o) is to allow employers and employees to collectively bargain regarding compensation for time spent changing clothes and washing, thus preventing the DOL and courts from invalidating collective bargaining agreements and existing practices. The purpose of the OSHA regulations is to identify types of "personal

protective equipment" that employers must provide to employees in order to "reduce employee exposure to hazards when engineering and administrative controls are not feasible or effective in reducing these exposures to acceptable levels." *See* Occupational Safety & Health Admin., *Personal Protective Equipment (PPE)*, available at https://www.osha.gov/SLTC/personalprotectiveequipment/index.html (last visited July 8, 2013) (OSHA website on personal protective equipment).

Third, the OSHA regulations offer confusion, not clarity. Under the OSHA regulations, employers are not required to pay for "everyday clothing" such as "long-sleeve shirts, long pants, street shoes, and normal work boots." 29 C.F.R. § 1910.132(h)(4)(ii). Employers are also not required to pay for "ordinary clothing" which OSHA combines with "skin cream, or other items used *solely for protection from weather*." 29 C.F.R. § 1910.132(h)(4)(iii) (emphasis added). This category includes: "winter coats, jackets, gloves, parkas, rubber boots, hats, raincoats, ordinary sunglasses, and sunscreen." *Id.* Only such "everyday" or "ordinary" clothing, Petitioners argue, are "clothes" under Section 3(o). Applying this rule, the same type of clothing could be included or excluded from Section 3(o) in different workplace environments.

For example, if an outdoor employee, such as a delivery driver, wears a raincoat (or some other "jacket") and gloves on a rainy day, it would be "ordinary clothing" under OSHA and included in Petitioner's definition of "clothes" under Section 3(o). The *same* raincoat, jacket, and gloves offered to an indoor employee, such as a sanitation worker in a poultry processing plant, would not qualify as "ordinary clothing" (because not used solely for protection

from weather) and would be excluded from Petitioners' definition of "clothes" under Section 3(o). The same result would hold true for rubber boots – "ordinary clothing" in the plant yard (if weather-related), but not on the plant floor no matter how wet the job is. Even more confusing, a "normal work boot" is "everyday clothing" but a "rubber boot" is not, and if a steel plate is built into the toe of a work boot, it is no longer "everyday clothing," even if worn every day. The distinction between sunglasses (clothes) and safety glasses (not clothes) is equally untenable. They are physically identical objects (two lenses, a nose holder, and frames) and both may be used for comfort and protection (to avoid sun glare or dust in the eyes), yet only one would be subject to Section 3(o).[5]

Fourth, even if OSHA regulations are an appropriate source for discerning the meaning of the term "clothes" in Section 3(o) of the FLSA, OSHA itself recognizes that "personal protective equipment" includes "specialized *clothing* or equipment worn by an employee for protection against a hazard." 29 C.F.R. § 1910.1030(b) (emphasis added); *see Sepulveda*, 591 F.3d at 215 (citing OSHA regulation). In other words, even in OSHA's view, "personal protective equipment" can be either "clothing" or "equipment," depending on the article. Thus, turning to OSHA regulations would raise more questions than it would answer.[6]

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[5] Petitioners' description, Pet. Br. at 8, of the special requirements of "laundering" the flame retardant jacket and pants worn by Respondent's employees – collectively referred to by Petitioners as "flame retardant *clothing*" and "flame retardant apparel" made of "a heavy fabric" – demonstrates that such items are "clothes" rather than "equipment".

[6] Petitioners' themselves acknowledge that the OSHA regulations would provide only a partial solution, stating that the

B. War Labor Board Decisions

Also unpersuasive is reliance by Petitioners and *amicus* AFL-CIO on four War Labor Board decisions issued in 1944 and 1945: *Big Four Meat Packing Cos.*, 21 War Labor Rep. 652 (1945); *Swift & Co.*, 21 War Labor Rep. 709 (1945); *John Morrell & Co.*, 21 War Labor Rep. 730 (1945); and *Continental Baking Co.*, 18 War Labor Rep. 470 (1944). *See* Pet. Br. at 25-26, 47-48; AFL-CIO Br. at 5-6, 8-9, 13-16. Petitioners and the AFL-CIO cite these decisions as evidence that the "common usage" of the term "clothing," of which Congress was aware when Section 3(o) was enacted in 1949, did not include items intended to protect employees from workplace hazards.

Congress dismantled the War Labor Board in 1946, one year before it enacted the Portal-to-Portal Act in 1947 and three years before it enacted Section 3(o) in 1949. There is no evidence in the legislative history that Congress considered, or was aware of, the War Labor Board decisions issued in 1944 and 1945. Nothing in the record indicates that findings by the War Labor Board were in "common usage."

The Portal-to-Portal Act and Section 3(o) were intended to modify judicial interpretations that Congress found to be in "disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C. § 251(a). Thus, contrary to the assertions by Petitioners and the AFL-CIO, rather than embracing and agreeing with the War Labor

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universe of protective clothing which they would exclude from Section 3(o) extends beyond that required by the OSHA regulations or the employer. Pet. Br. at 57, fn. 51.

Board decisions, it seems more likely that the decisions were just the sort of judicial overreach that Congress intended to correct by enacting the Portal-to-Portal Act and Section 3(o): Decisions disregarding long-established customs, practices and contracts between employers and employees – after all, there would have been no need for employees to litigate the issue if the employers had been paying for donning and doffing time. In fact, in *Continental Baking*, the Board rejected the baking company's argument that "time spent in changing to and from working clothes has never been regarded in the baking industry as constituting working time for which the employees should be remunerated." 18 War Labor. Rep. at 471.

Finally, even if the Court gives some weight to these decisions, they do not support a narrow definition of the term "clothes" in Section 3(o). Rather, the decisions characterize as "clothes" many items that Petitioners and AFL-CIO would exclude from Section 3(o) as "personal protective equipment." In *Big Four Meat Packing*, for example, the Board characterized work clothing as "outer working garments such as smocks, overalls, frocks, uniforms, boots, rubbers, leather aprons, raincoats, and gloves." 21 War Labor Rep. at 763. *See also John Morrell & Co.*, 21 War Labor Rep. at 733 (discussing "special purpose working garments"); *Swift & Co.*, 21 War Labor Rep. at 711 (same). But Petitioners would exclude all these items from the definition of clothing as "outer garments" put on over street clothes, not made of ordinary cloth, and designed to protect employees from workplace hazards. If this Court follows the reasoning of the War Labor Board, then items such as boots, gloves, aprons and smocks must be considered "clothes" under Section 3(o).

V. "CLOTHES" INCLUDE ANY ARTICLE THAT AN EMPLOYEE WEARS ON HIS OR HER PERSON TO BE READY TO WORK

"[W]ords are given meaning by their context, and context includes the purpose of the text." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012). Here, the meaning of the word "clothes" is best found by considering its context: A provision in the FLSA providing that employers and unions can bargain and reach agreement regarding the compensability of donning and doffing clothes in the workplace at the beginning and end of the work day. Petitioners focus too much on particular articles of clothing – on the words "changing" and "clothes," taken out of context. The focus of Section 3(o) is the *activity* of changing clothes and washing. In 1949, Representative Herter discussed the activity of changing clothes by bakery workers and existing collective bargaining agreements in the industry on the compensability of clothes-changing time. 95 Cong. Rec. H11,210 (daily ed. Aug. 10, 1949). The legislative history of Section 3(o) includes no discussion of what items bakery workers wore to work in 1949. The focus was never on the items worn, but, rather, the clothes changing activity itself.

By focusing on particular articles of clothing, Petitioners also seem to forget that the context of Section 3(o) is the workplace (not a shopping mall). A narrow definition that would exclude most items that employees must wear to perform their jobs is nonsensical given the workplace context of the FLSA and Section 3(o). As Judge Posner stated below: "Given the subject matter of the Fair *Labor* Standards Act it would be beyond odd to say that the word 'clothes' in

section 203(o) excludes work clothes, especially since the section is about changing into and out of clothes at the beginning and end of the workday." *Sandifer*, 678 F.3d at 594 (emphasis in original); *see also id.* at 595 ("Since workers very rarely change at work from street clothes to street clothes, section 203(o) would as we said be virtually empty if the Ninth Circuit was right.").

Further, a narrow definition would defeat the purpose of Section 3(o) to leave the issue of compensation for clothes-changing time to collective bargaining. If most work clothes are excluded from Section 3(o), as Petitioners contend, very little is left for bargaining. It seems that Petitioners would have the Court believe that collective bargaining is an undesirable forum for resolving the issue of compensation for clothes-changing time. However, Congress has long recognized the benefits of collective bargaining by enacting the National Labor Relations Act ("NLRA") in 1935. 29 U.S.C. §§ 151-169. The NLRA declares that the national commerce policy is to be carried out "by encouraging the practice and procedure of collective bargaining" and by protecting the right of employees to organize and designate representatives "for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." *Id.* § 151. Section 8(d) of the NLRA requires an employer and the employees' union to bargain in "good faith" over wages, hours, and other terms and conditions of employment. *Id.* § 158. Employers must negotiate over all health and safety issues (including the wearing of protective clothing) that affect the terms and conditions of employment. *See American Nat'l Can Co.*, 293 NLRB 901, 904 (1989). Employers must also bargain with unions over work hours,

including working overtime. *Kerry, Inc.*, 2012 NLRB LEXIS 558, *49 (2012).

Given that unions bargain over the issues of health, safety and work hours – and are more familiar than the DOL or federal courts with an employer's business and the employees they represent – unions are uniquely qualified to bargain over the compensability of donning and doffing work clothes, including protective clothing. In fact, it is sound policy to encourage unions and employers to bargain over the wearing of protective clothing, or any other safety issue, above and beyond the minimum requirements of federal or state law. During this bargaining, for example, a union may request or demand that an employer provide covered employees with clothes to protect them from workplace injury, even though such protective clothing is not required by law. If this clothing takes extra time to don and doff at the beginning and end of the workday, Section 3(o) allows employers and unions the freedom to also negotiate over the compensability of that time. If the employees want the employer to buy them the most expensive steel-toed boot on the market, through bargaining, they can agree to forego compensation for the few minutes they take to don and doff in exchange for the more expensive boots. Or, a union can trade off a few minutes of compensable time for a higher wage rate or some other benefit that is important to the employees it represents.

Section 3(o) gives employers and employees the right to bargain collectively regarding the compensability of clothes-changing time. On subjects of bargaining, "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate

the substantive solution of their differences." *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 489 (1960). Within this framework, the parties can separately "order their priorities" and then "trade off what is less important for what is more important to each side individually." *NLRB v. Cable Vision, Inc.*, 660 F.2d 1 (1st Cir. 1981).

By urging the Court to construe Section 3(o) narrowly,[7] Petitioners would take away the right of employers and employees to bargain collectively regarding compensation for clothes-changing time – apparently against the wishes of the Steelworkers union (Pet. Br. at 10-11). In addition, Petitioners' proposed definition also fails as unworkable. Petitioners propose that Section 3(o) exclude "items that, unlike ordinary clothing, both are used to protect employees against workplace hazards and were designed to provide such protection." Pet. Br. at 17. Under this general rule, Petitioners would exclude from Section 3(o): items made of any material other than ordinary cloth, Pet. Br. at 20; items infused with chemicals, *id.*; items worn over street clothes, *id.* at 22; items that cover only a portion of the body that would

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[7] Courts and litigants have debated whether Section 3(o) is an "exemption" that should be construed narrowly or an "exclusion" to which the traditional adage of construing FLSA exemptions narrowly does not apply. *Compare Sandifer*, 678 F.3d at 595, *with Alvarez*, 339 F.3d at 905, *and* Pet. Br. at 51-56. But Section 3(o) is perhaps best viewed as creating a substantive right – the right to bargain collectively. An employee's right to bargain collectively regarding clothes-changing time, conferred by Section 3(o) of the FLSA, should be treated no differently than an employee's right to be paid the minimum wage and overtime – and no differently than the right to bargain collectively conferred by the NLRA. Substantive rights should not be construed narrowly.

not be covered by ordinary clothing, *id.* at 19; items worn on the extremities, *id.* at 19; and items employers are required to provide to employees under OSHA's personal protective equipment regulations, *id.* at 57. To implement this rule, courts would have to determine, item by item: How is the item used? For what purpose was the item designed? What materials were used in the construction of the item? Is that material "ordinary cloth"? Is the item worn over other clothes? Where on the body is the item worn?

The most workable definition of the word "clothes" in Section 3(o) – for employers, employees, unions, the DOL and the courts – is the definition most consistent with the text, context and purpose of Section 3(o): Any article that an employee wears on his or her person to be ready to work.

CONCLUSION

For the foregoing reasons, the decision of the Seventh Circuit should be affirmed.

Respectfully submitted,

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